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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 73-430

WILLIAM K. DICKEY, ALFRED N. BEADLESTON and THOMAS H. KEAN,

Petitioners,

vs.

KENNETH ROBINSON and WILLIAM T. CAHILL, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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Docket No.

WILLIAM K. DICKEY, ALFRED N. BEADLESTON and THOMAS H. KEAN,

Petitioners,

vs.

KENNETH ROBINSON and WILLIAM T. CAHILL, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

The petitioners, William K. Dickey, as a defendant herein and Alfred N. Beadleston and Thomas H. Kean, as successors in office to named defendants, Raymond H. Bateman, William K. Dickey (respectively as President of the New Jersey Senate and Speaker of the General Assembly of the State of New Jersey) petition for a writ of certiorari to review the judgment of the New Jersey Supreme Court.

Opinions Below

The opinion of the New Jersey Superior Court is reported at 118 N. J. Super. 223, 287 A. 2d 187: supplemental opinion of the New Jersey Superior Court is reported at 119 N. J. Super. 40, 289 A. 2d 569; the opinion of the New Jersey Supreme Court is reported at 62 N. J. 473, 303 A. 2d 273; supplemental opinion of the New Jersey Supreme Court is reported at 63 N. J. 196, 306 A. 2d 65. Said opinions are appended hereunto as appendices A, B, C and D, respectively.

Jurisdiction

The judgment sought to be reviewed is dated and was entered on June 19, 1973.*

The jurisdiction of this court is invoked under 28 U.S.C.A. § 1257(3).**

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* The opinion of the New Jersey Supreme Court constitutes its judgment, N.J. Court Rules 2:11-3(b). In its opinion filed April 3, 1973, the New Jersey Supreme Court directed further argument on the content of the judgment (*infra*, p. 146a). The court entered its further judgment (i.e. opinion) on June 19, 1973 (*infra*, p. 147a) which constitutes the final judgment. The time within which to appeal a petition for certiorari runs from the date of the June 19, 1973 judgment, *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, 177 (1944); *Burns* v. *Richardson*, 384 U. S. 73, 82-83 (1966).

** This court has granted certiorari under this statute to review the validity under the federal constitution of provisions in a state constitution. *Griffin* v. *California*, 380 U. S. 609 (1965). See also *Ohio* v. *Akron Park District*, 281 U. S. 74 (1930) where on appeal under U.S.C.A. § 1257(2), this court passed on the validity of a state constitutional provision.

Petitioners applied by motion to the New Jersey Supreme Court for an extension of time to petition for rehearing. A copy of the motion, supporting affidavits and brief is annexed hereto as Appendix E (p. 151a).* The New Jersey Supreme Court denied the motion by order dated August 2, 1973 (Appendix F; p. 170a).

Questions Presented

1. Does this court have jurisdiction to enforce, under the circumstances of this case, the guarantee of a Republican form of government mandated by Article IV, Sec. 4 of the U. S. Constitution?

2. Does the decision of the New Jersey Supreme Court so violate the doctrine of the separation of powers as to deprive the people of New Jersey of a Republican form of government?

3. Does the decision of the New Jersey Supreme Court violate the doctrine of the separation of powers by:

   a. Interfering with the sole prerogatives of the State Legislature under Article VIII, Sec. 4, Par. 1 of the New Jersey Constitution?

   b. Usurping the fiscal powers of the State Legislature respecting taxation and the appropriation of moneys?

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* New Jersey Court Rules 2:11-6(a) provide that a petition for rehearing must be made within ten days after entry of judgment. For reasons stated in the affidavits annexed to the motion, petitioners were unable to seek a rehearing within the ten day period.

The Constitutional Provisions

U.S. Constitution, Article IV, Sec. 4:

> "Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

New Jersey Constitution:

"ARTICLE III

DISTRIBUTION OF THE POWERS OF GOVERNMENT

1. Branches of government

1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

New Jersey Constitution:

"ARTICLE VIII

TAXATION AND FINANCE

SECTION IV

1. Maintenance and support of schools

1. The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."

Statement of the Case

This action was brought for the purpose of having the Court declare unconstitutional the New Jersey statutes providing for the financing of elementary and secondary schools. Relief was sought primarily under the equal protection clause of the Fourteenth Amendment of the U.S. Constitution and under Article VIII, Sec. 4, Par. 1 of the New Jersey Constitution.

The trial judge held that the statutory scheme violates both the education clause of the New Jersey Constitution (118 N. J. Super. 265); *infra,* p. 55a; *et seq.*) and also the equal protection clause of the Fourteenth Amendment (118 N. J. Super. 270, *infra,* p. 61a; *et seq.*). On appeal, the New Jersey Supreme Court held that no relief could be granted under the equal protection clause of either the Fourteenth Amendment* (62 N. J. 482-492; *infra,* pp. 98a-111a) or of the New Jersey State Constitution (62 N. J. 492-501; *infra,* pp. 111a-122a).

With respect to the education clause in the State Constitution, the New Jersey Supreme Court held that the statutes presently in effect for supporting state education, even when fully funded in the future under a progressive schedule of increased appropriations, would not satisfy the constitutional requirements (62 N. J. 519; *infra,* p. 143a). The court went on to state (62 N. J. 520; *infra,* p. 145a): "Upon the record before us, it may be doubted that the thorough and efficient system of schools required by * * * [the state Constitution] can realistically be met by reliance upon local taxation." With respect to the subject of remedies and the content of the judgment, the court stated a desire for "a further

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See also: *San Antonio Independent School District* v. *Rodriguez,* —— U. S. ——, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

view of the parties," and set a short date for argument. Following such argument, the opinion and judgment of June 19, 1973 was filed (Appendix D, *infra,* p. 147a).

The petitioners contend that the New Jersey Supreme Court, in finding that the provisions which the New Jersey Legislature, in the exercise of its duties under Article VIII, Sec. 4, Par. 1 of the State Constitution, had made for the support of public schools were inadequate, has so far departed from the accepted and usual restraints upon judicial power,—indeed, from its own prior holdings as to such limitations,—as to upset the balance of power between the three branches of state government required by Article III, Par. 1 of the State Constitution.

The separation of powers is such an essential and integral part of a Republican form of government, that the New Jersey Supreme Court has effectively denied the people of New Jersey what the U.S. Constitution guarantees them in Article IV, Sec. 4.

In the case at bar, the threat to the Republican form of government does not result from extra-legal or political processes. Instead, it arises from a judicial decision by the state's court of last resort. Under these peculiar circumstances there can be no redress save by resort to the United States Supreme Court. The issue presented is one which this court is competent to handle, and is justiciable in every sense of the term.

Federal Questions

The federal question for which review is sought in this court involves Article IV, Sec. 4 of the U.S. Constitution. This section was not referred to in the pleadings nor was its applicability litigated in the state courts. The constitutional issue under Article IV, Sec. 4 arises out

of the terms of the decision by the New Jersey Supreme Court. The New Jersey Supreme Court decision interfered with the prerogatives given the Legislature under Article VIII, Sec. 4, Par. 1 of the New Jersey Constitution. Such a result appears to be contrary to prior decisions by the New Jersey Supreme Court dealing with the boundary between legislative and judicial power. The decision by the New Jersey Supreme Court constitutes state action which deprives the people of New Jersey of a Republican form of government guaranteed them by the Federal Constitution.

In the brief supporting petitioners' motion for an extension of time to apply for rehearing in the New Jersey Supreme Court, a claim that Article IV, Sec. 4 of the U.S. Constitution had been violated was raised (*infra*, p. 168a). The New Jersey Supreme Court denied the motion for an extension of time to petition for rehearing (*infra*, p. 170a). Therefore, the federal question sought to be reviewed by this court was seasonably raised. Under such circumstances, this court has not hesitated to review the claim of a violation of petitioners' constitutional rights, *Saunders* v. *Shaw*, 244 U. S. 317, 320 (1917); *Ohio* v. *Akron Park District*, 281 U. S. 74, 79 (1930); *Great Northern Railway* v. *Sunburst Company*, 287 U. S. 358, 367 (1932); *International Seal Company* v. *National Surety Company*, 297 U. S. 657, 665 (1936).

ARGUMENT

1. This court has jurisdiction to enforce the guarantee of a Republican form of government mandated by Article 4, Sec. 4 of the U. S. Constitution.

Petitioner's attack on the decision of the New Jersey Supreme Court directly presents an issue arising out of the Federal Constitution since the petitioners' position will be sustained if Article IV, Sec. 4 is given one construction and will be defeated if it is given another,—hence this court has jurisdiction, *Powell* v. *McCormack*, 395 U. S. 486, 514 (1969).

Moreover, this case presents a justiciable controversy. In *Luther* v. *Borden*, 48 U. S. (7 How.) 1, (1849) the question was presented which of two opposing governments in Rhode Island was the legitimate one, and federal jurisdiction was invoked under the guarantee clause, Article IV, Sec. 4. The Supreme Court held that the issue was a political question and beyond its competence. Justice Woodbury dissented, holding that the Republican form of government forbade "unlimited power exercised either by Legislatures or the executive or courts" (p. 69).

It has never been doubted that a separation of powers is an integral and essential element of the Republican form of government. *Bauers* v. *Heisel*, 361 F. 2d 581 (3rd Cir. 1966); *cert. den.* 386 U. S. 1021 (1967); *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), Harlan, J. dissenting at 564; *Taylor and Marshall* v. *Beckham*, 178 U. S. 548 (1900), Harlan, J. dissenting at 609. In *Bauers* v. *Heisel*, *supra*, the court stated by way of dictum that "a separate and independent judiciary is an indispensable element of a Republican form of government" (p. 588).

The traditional view, following *Luther* v. *Borden, supra,* that questions arising under the guarantee clause, Article IV, § 4, were nonjusticiable because "political" in nature and because only Congress can enforce that constitutional guarantee, *Ohio* v. *Akron Park District,* 281 U. S. 74 (1930); *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608 (1936), is no longer tenable,* and the case at bar presents this court with an opportunity to relax the dead hand of *Luther* v. *Borden.* In *Baker* v. *Carr,* 369 U. S. 186 (1962), Frankfurter, J. dissenting said at p. 297:

> "Art. IV, § 4, is not committed by express constitutional terms to Congress. It is the nature of the controversies arising under it, nothing else, which has made it judicially unenforceable."

The court itself, in that case, laid down a new concept of justiciability. Further progress toward ultimate recognition of the justiciability of questions under the guarantee clause were noted in *Reynolds* v. *Sims,* 377 U. S. 533, 582 (1964). Lower courts have now suggested that questions under the guarantee clause are no longer subject to the wholesale condemnation of being nonjusticiable, *Bauers* v. *Heisel,* 361 F. 2d 581, 589 (3rd Cir. 1966); *cert. den.* 386 U. S. 1021 (1967); *Kohler* v. *Tugwell,* 292 F. Supp. 978 (E. D. La. 1968), affirmed 393 U. S. 531 (1969). In *Kohler,* the court said with respect to the guarantee clause at p. 985: "The nature of the question, therefore, and not the mere invocation of the clause, determines whether a contention is justiciable and the clause judicially enforceable." In his 1964 Ross Prize winning essay, Mr. Nahstoll argues cogently for expan-

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* See Footnote 2 in concurring opinion of Mr. Justice Douglas in *Baker* v. *Carr,* 369 U. S. 186 (1962) at pp. 242-243.

sion of the court's jurisdiction under the guarantee clause of Article IV, § 4, "The Role of the Federal Courts in the Reapportionment of State Legislatures", 50 A.B.A. Journal 842.

The fact that the issue raised may be characterized as having "political" overtones, does not make it any less justiciable. *Baker* v. *Carr,* 369 U. S. 186 (1962); *Powell* v. *McCormack,* 395 U. S. 486 (1969); *Soucie* v. *David,* 448 F. 2d 1067 (App. D. C. 1971), footnote 11, p. 1072; *Mottola* v. *Nixon,* 318 F. Supp. 538, 548 (N. D. Cal. 1970), rev. other grounds 464 F. 2d 178 (9 Cir. 1972); See: *Commonwealth of Massachusetts* v. *Laird,* 451 F. 2d 26 (1 Cir. 1971).

It should be emphasized that Article IV, Sec. 4 does not say that only Congress shall guarantee a Republican form of government. Rather, it states that "The United States shall guarantee * * *". The Supreme Court is as much a part of the United States as is the Congress. Therefore, this court has every responsibility to implement Article IV, Sec. 4. Moreover, there is no "textual, demonstrable, constitutional commitment"* to the Congress of the guarantee.

2. The New Jersey Constitution mandates the doctrine of the separation of powers.

Article III, Par. 1 of the New Jersey Constitution provides:

> "1. Branches of government
>
> 1. The powers of the government shall be divided among three distinct branches, the legisla-

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* *Baker* v. *Carr, supra,* 369 U. S. 217; *Powell* v. *McCormack,* 395 U. S. 486, 518 (1969).

> tive, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

The New Jersey courts have repeatedly upheld the doctrine of the separation of powers as applied to the state government. The *State* v. *The Governor,* 25 N. J. L. 331, 349-351 (S. Ct. 1856); *Allan* v. *Durand,* 137 N. J. L. 30, 32, 57 A. 2d 668 (S. Ct. 1948); *Massett Building Co.* v. *Bennett,* 4 N. J. 53, 57, 71 A. 2d 327 (1950); *David* v. *Vesta Co.,* 45 N. J. 301, 212 A. 2d 345 (1965); *Passaic County Bar Ass'n.* v. *Hughes,* 108 N. J. Super. 161, 260 A. 2d 261 (Ch. Div. 1969). In *David* v. *Vesta Co., supra,* the New Jersey Supreme Court, in discussing Article III of the State Constitution said (45 N. J. 323, 212 A. 2d 357):

> "The doctrine of separation of powers is a fundamental principle of American government, expressly provided for in the constitutions of many states, and implied in almost all the others and in the federal government from the creation of the three separate branches of government. See Annot. 69 A.L.R. 266 (1930); Annot. 89 A.L.R. 1113 (1934)."

(45 N. J. 326, 212 A. 2d 358):

> "The doctrine of separation of powers must therefore be viewed not as an end in itself, but as a general principle intended to be applied so as to maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent the concentration of *unchecked* power in the hands of any one branch."

In particular, the New Jersey courts have traditionally refrained from interfering with the power and authority of the Legislature to appropriate money. *Fitzgerald* v. *Palmer,* 47 N. J. 106, 108, 219 A. 2d 512, 513 (1966); *O'Neill* v. *State Highway Dept.,* 50 N. J. 307, 235 A. 2d 1 (1967); *City of East Orange* v. *Palmer,* 52 N. J. 329, 245 A. 2d 327 (1968). In *O'Neill* v. *State Highway Department, supra,* Chief Justice Weintraub said for the court at 50 N. J. 315, 235 A. 2d 5:

> "• • • the judiciary cannot compel its co-equal branches of government to appropriate moneys to pay."

Similarly, the New Jersey courts have traditionally refrained from interfering with the power and authority of the Legislature to impose taxes. In *Jersey City* v. *Kelly,* 134 N. J. L. 239 (E. & A. 1946), 47 A. 2d 354, the court of last resort stated at 134 N. J. L. 248; 47 A. 2d 358:

> "This case presents a perfect example for the application of that very salutary rule of law proscribing interference by the judiciary with the fiscal policies of government committed by the constitution to the legislative branch of our government."

In *Ridgefield Park* v. *Bergen County Board of Taxation,* 31 N. J. 420, 157 A. 2d 829 (1960), the New Jersey Supreme Court, speaking through Chief Justice Weintraub, said at 31 N. J. 431, 157 A. 2d 835:

> "The judiciary has no power to devise tax programs or to qualify the existing legislative mandate with a judge's private view of what is just or sensible."

3. The decision below violates the doctrine of the separation of powers by interfering with the sole prerogatives of the Legislature under N. J. Constitution, Article VIII, Sec. 4, Par. 1.

The New Jersey doctrine of the separation of powers has particular relevance to the education clause in the Constitution which formed the keystone of the decision below, 62 N. J. 515, 303 Atl. 2d 287 (*infra*, p. 139a) *et seq.* Significantly, this constitutional provision (Art. VIII, Sec. IV, ¶1)—"The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools * * *"—is found in Article VIII entitled "Taxation and Finance", which deals with other aspects of those subjects in Sections I, II and III.

Discussion below centered on the adequacy of state financing of local public schools provided by the so-called 1970 Act. The court stated at 62 N. J. 519, 303 Atl. 2d 297 (*infra*, p. 143a):

> "We have outlined the formula of the 1970 Act to show that it is not demonstrably designed to guarantee that local effort plus the State aid will yield to all the pupils in the State that level of educational opportunity which the 1875 amendment mandates. We see no basis for a finding that the 1970 Act, even if fully funded, would satisfy the constitutional obligation of the State."

The court further held at 62 N. J. 520, 303 Atl. 2d 297 (*infra*, p. 145a):

> "Upon the record before us, it may be doubted that the thorough and efficient system of schools required by the 1875 amendment can realistically be met by reliance upon local taxation."

Unmistakably, the court below ruled that the Legislature would have to appropriate larger sums out of state revenues for public education. In so doing, it violated its own repeated rulings that the separation of powers as mandated by N.J. Constitution, Article III, Par. 1, precludes the courts from ordering the legislative appropriation of money.*

State constitutional provisions elsewhere which require the Legislature to provide for an "efficient" public school system have been interpreted so as to leave solely to legislative discretion the amount of moneys to be appropriated for such purposes. *Prowse* v. *Board of Education,* 134 Ky. 365, 120 S. W. 307 (C. of A. 1909); *Sawyer* v. *Gilmore,* 109 Me. 169, 83 Atl. 673 (S. Jud. Ct. 1912); *Mumme* v. *Marrs,* 120 Tex. 383, 40 S. W. 2d 31 (S. Ct. 1931); see also Part II, C of this court's opinion in *San Antonio Independent School District* v. *Rodriguez,* —— U. S. ——, 93 S. Ct. 1278, 36 L. Ed. 2d 16, 47 (1973); *McInnis* v. *Shapiro,* 293 F. Supp. 327 (N. D. Ill. 1968), aff'd *sub nom. McInnis* v. *Ogilvie,* 394 U. S. 322 (1969); *Burruss* v. *Wilkerson,* 310 F. Supp. 572 (W. D. Va. 1969), aff'd. 397 U. S. 44 (1970).

Furthermore, the determination of the standards under such constitutional provisions,—i.e. the determination of the thoroughness and efficiency of the public school system,—is a matter solely for the Legislature with which the courts have no right to interfere. *Fiedler* v. *Eckfeldt,* 335 Ill. 11, 166 N. E. 504, 509, 510 (Supreme Court 1929);

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* The court below was not unaware of this problem. In its supplemental opinion of June 19, 1973, the court stated at 63 N. J. 198, 306 Atl. 2d 66 (*infra,* p. 149a): "We withhold ruling upon the question whether, if such legislation is not so adopted, the Court may order the distribution of appropriated moneys toward a constitutional objective notwithstanding the legislative directions."

People v. *Deatherage*, 401 Ill. 25, 81 N. E. 2d 581, 586 (Supreme Court 1948); *Ehret* v. *School District of Kulpmont*, 333 Pa. 518, 5 A. 2d 188, 192 (Supreme Court 1939).

Three situations must be distinguished. The courts will declare a statute unconstitutional if it affirmatively transgresses the limitations or restrictions placed by the constitution upon the Legislature's powers. See, for example, *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965); *United States* v. *Brown*, 381 U. S. 437 (1967). Nonaction by the Legislature in the face of an affirmative constitutional duty to act will be corrected by the courts. See, for example, *Baker* v. *Carr*, 369 U. S. 186 (1962); *Asbury Park Press, Inc.* v. *Woolley*, 33 N. J. 1, 161 A. 2d 705 (1960). The third situation is that the courts will not declare a statute unconstitutional if it exercises only partially the powers given by the constitution to the Legislature. As Mr. Justice Holmes said in *Roschen* v. *Ward*, 279 U. S. 337 (1929) at 339:

> "A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce."

To the same effect: *Goesaert* v. *Cleary*, 335 U. S. 464, 467 (1948); *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 50 (1966); *Katzenbach* v. *Morgan*, 384 U. S. 641, 657 (1966); *N. J. Chapter A. I. P.* v. *N. J. State Board of Professional Planners*, 48 N. J. 581, 227 A. 2d 313 (1967).

It is the third situation which describes that presented by the case at bar. The New Jersey Legislature has acted to provide for a thorough and efficient school system. See Title 18A of the New Jersey Statutes Annotated. It has by statute, N.J.S.A. 18A:4-3, created a

State Board of Education which has general supervision of the public school system.* In addition, the Legislature has provided for a Commissioner of Education, N.J.S.A. 18A:4-21, *et seq.* who has authority to "inquire into and ascertain the thoroughness and efficiency" of public schools N.J.S.A. 18A:4-24. The New Jersey Supreme Court has remarked upon the extensive powers and authority which have been granted to the Commissioner of Education. *Board of Education, East Brunswick* v. *Township Council, East Brunswick*, 48 N. J. 94, 100-106, 223 A. 2d 481, 484-487 (1966); *Jenkins* v. *Township of Morris School District*, 58 N. J. 483, 493-495, 279 A. 2d 619, 625 (1971).

The court below specifically held that there had been no transgression of constitutional restrictions or limitations. Clearly, this is not a situation where the Legislature has refused to act at all. In blunt terms, the New Jersey Legislature has acted to provide for a thorough and efficient school system, but the New Jersey courts, substituting their own judgment for that of the Legislature, are not satisfied with the results.

To sum up, the New Jersey Supreme Court committed serious errors in declaring the State's school financing system to be unconstitutional:

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* N.J.S.A. 18A:4-10 provides: "The general supervision and control of public education in this state, except higher education, and of the state department of education shall be vested in the state board, which shall formulate plans and make recommendations for the unified, continuous and efficient development of public education, other than higher education, of people of all ages within the state."

The present system does not violate anyone's constitutional rights* as the court below recognized, 62 N. J. 482-501, 303 Atl. 2d 277-287 (*infra*, pp. 98a-122a).

The criteria of a "thorough and efficient" school system are not sufficiently precise to permit judicial evaluation and administration, but require expertise which the courts do not possess, as this court stated in *San Antonio Independent School District* v. *Rodriguez, supra.* 36 L. Ed. 2d 48. The New Jersey Legislature has recognized this by delegating responsibility for maintaining the constitutional standards to the State Board of Education and to the Commissioner of Education.

The assumption by the New Jersey Supreme Court that the thoroughness and efficiency of the school system can be evaluated in the terms of dollar input per pupil given the absence of any other viable criterion (62 N. J. 515; 303 Atl. 2d 295; *infra*, p. 140a) is entirely unwarranted and unsupported. In *San Antonio Independent School District* v. *Rodriguez, supra,* 36 L. Ed. 2d 37, this court referred to "* * * the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it * * *"; and see footnotes 56, 86 and 101 of this court's opinion.

The New Jersey Supreme Court has made a direct attack on the way in which the State Legislature has chosen to raise and disburse state and

* There is no constitutional right to an education. *San Antonio Independent School District* v. *Rodriguez, supra,* 36 L. Ed. 2d 40-47.

> local tax revenues, thereby invading the area which that court has repeatedly held lies beyond the scope of judicial authority.*

In short, by a process of successive errors and departures from its prior decisions, the New Jersey Supreme Court has arrived at a result which so seriously disarranges the [State] constitutionally required separation of powers as to threaten the form of government in the state. Since, as a practical matter, the law in this area is what the New Jersey Supreme Court says it is, the only lawful form of redress is to ask this court to implement and enforce the guarantee contained in Article IV, Sec. 4 of the U.S. Constitution.

CONCLUSION

For all of the reasons urged, and because of the great public importance of the issues raised, petitioners respectfully pray that a writ of certiorari be granted.

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Attorney for Petitioners

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Newark, New Jersey
Of Counsel

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* Cf. *San Antonio Independent School District* v. *Rodriguez, supra,* 36 L. Ed. 2d 47.

APPENDIX A

Opinion of the Superior Court of New Jersey, Law Division (118 N.J. Super. 223)

KENNETH ROBINSON, an infant by his parent and guardian *Ad Litem*, ERNESTINE ROBINSON and ERNESTINE ROBINSON, individually; PAUL JORDAN, ARTHUR DWYER, FRANK H. BLATZ, and WILLIAM S. HART, individually and as Mayors respectively of Jersey City, Paterson, Plainfield and East Orange; THE CITIES OF JERSEY CITY, Paterson, Plainfield and East Orange; THE BOARDS OF EDUCATION OF THE SCHOOL DISTRICTS OF JERSEY CITY, Paterson, Plainfield and East Orange; THE BOARD OF SCHOOL ESTIMATE OF JERSEY CITY; and RICHARD F. McCARTHY; all individually and as representatives of a class of classes, Plaintiffs, v. William T. Cahill, Governor of the State of New Jersey; JOSEPH M. McCRANE, JR., Treasurer of the State of New Jersey; GEORGE F. KUGLER, Attorney General of the State of New Jersey; RAYMOND H. BATEMAN, President of the New Jersey Senate and THE NEW JERSEY SENATE; WILLIAM K. DICKEY, Speaker of the General Assembly of the State of New Jersey and THE GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY; THE STATE OF NEW JERSEY; CARL L. MARBURGER, Commissioner of Education and THE DEPARTMENT OF EDUCATION; THE STATE BOARD OF EDUCATION; all in their official and individual capacities, defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

Decided January 19, 1972.

SYNOPSIS

Appendix A

Action was brought by residents, taxpayers and various municipal officials challenging constitutionality of system of financing public schools of New Jersey. The Superior Court, Law Division, Botter, J. S. C., held that New Jersey system of financing public education which relies heavily on local taxes, which pay for about 67% of public school costs and which leads to great disparity among the various districts with respect to their ability to finance adequate education, denies equal protection rights guaranteed by the New Jersey and Federal Constitutions since it discriminates against pupils and district with low real property wealth and against taxpayers by imposing unequal burdens for a common state purpose, but the declaration of unconstitutionality shall operate prospectively only and permit continued operation of school system under existing tax laws until legislature has had time to act.

Judgment in accordance with opinion.

For supplemental opinion see ——A. 2d ——.

1. Schools and school district

Purpose of education clause of New Jersey Constitution relating to legislative maintenance and support of a thorough and efficient system of free public schools is to make it a state legislative obligation to provide a thorough education for all pupils wherever located, but this does not preclude local administration and responsibility. Const. 1947, Art. VIII, § IV, par. 1.

2. Schools and school districts

Although district can be created and classified for appropriate legislative purposes, state school tax remains

a state tax even though assessed and levied locally upon local property with revenues returned by state to local districts. Const. 1947, Art. VIII, § IV, par. 1.

3. Schools and school districts

Under education clause of Constitution requiring legislature to provide for maintenance and support of a thorough and efficient system of free public schools word "thorough" connotes in common meaning the concept of completeness and attention to detail and means more than simply adequate or minimal. Const. 1947, Art. VIII, § IV, par. 1.

4. Schools and school district

Evidence supported finding that a thorough education system was not being afforded to all pupils in New Jersey whose financing of public education relies heavily on local property taxes, although the Bateman Act providing for significant improvement on foundation plan in equalizing the local revenue raising power would probably afford sufficient financing for a thorough education if Act were fully funded. N.J.S.A. 18A:58-1 *et seq.*, 18A:58-18.1, 54:1-35.1 *et seq.*.

5. Schools and school districts

Bateman Act providing for improvement in equalizing local revenue raising power for school district but giving under present operation minimum aid to even wealthy districts while there were school districts which were underfinanced is, as presently funded, violative of state constitutional requirement of a thorough education for all, but fully funded would probably reach the goal. N.J.S.A. 18A:58-18.1; Const. 1947, Art. VIII, § IV, par. 1.

Appendix A

6. Schools and school districts

While Bateman Act was, as presently funded to provide for minimal aid to wealthy districts while other district remained underfinanced, violative of constitutional standard of a thorough education, it would not be invalidated on ground that at present funding levels it did not provide a thorough education for all. N.J.S.A. 18A:58-18.1; Const. 1947, Art. VIII, § IV, par. 1.

7. Schools and school districts

Providing free education for all is a state function and must be accorded to all on equal terms. Const. 1947, Art. I, par. 1; Art. VIII, § IV, par. 1.

8. Schools and school districts

Public education cannot be financed by a method that makes a pupil's education depend on wealth of his family and neighbors as distinguished from wealth of all taxpayers of the same class throughout the state. Const. 1947, Art. I, par. 1; Art. VIII, § IV, par. 1.

9. Constitutional law

Schools and school districts

New Jersey system of financing public education which relies heavily on local taxes, which pays for about 67% of public school costs and which leads to great disparity among the various districts with respect to their ability to finance adequate education denies equal protection rights guaranteed by the New Jersey and Federal Constitutions since it discriminates against pupils and district with low real property wealth and against taxpayers

by imposing unequal burdens for a common state purpose, but the declaration of unconstitutionality shall operate prospectively only and not forbid continued operation of school system under existing tax laws until legislature has had time to act. N.J.S.A. 18A:58-1 *et seq.*, 18.1; Const. 1947, Art. I, par. 1; Art. VIII, § IV, par. 1; U.S.C.A. Const. Amend. 14.

10. Constitutional law

Where fundamental rights are asserted under equal protection clause, classifications will be closely scrutinized. U.S.C.A. Const. Amend. 14.

11. Constitutional law

Equality provisions of State and Federal Constitutions preclude taxing the same class of property at different rates. U.S.C.A. Const. Amend. 14; Const. 1947, Art. VIII, § I, par. 1(a).

Mr. Harold J. Ruvoldt, Jr., for plaintiffs (*Messrs. Ruvoldt and Ruvoldt*, attorneys).

Mr. Stephen G. Weiss (Mr. Weiss was an Assistant Attorney General when this action was commenced and has continued with the case as special counsel.) for defendants (*Mr. George F. Kugler, Jr.*, Attorney General of New Jersey, attorney).

Mr. William J. Bender and Mr. Frank Askin filed a brief *amicus curiae* on behalf of the Education Committee of the National Association for the Advancement of Colored People, Newark Chapter, and the American Civil

Liberties Union of New Jersey (*Mr. David G. Lubell and Mr. Paul Tractenberg* of the New York Bar, of counsel).

Mr. Melville D. Miller, Jr., Staff Attorney, State Office of Legal Services, Department of Community Affairs, filed a brief *amicus curiae* on behalf of the poor of New Jersey (*Mr. Carl Bianchi*, attorney).

Mr. Robert A. Coogan filed a brief *amicus curiae* on behalf of Gerald K. Loeb (*Messrs. Saling, Moore, O'Mara and Coogan*, attorneys).

Botter, J. S. C. This action challenges the constitutionality of the system of financing elementary and secondary public schools of New Jersey. The case is similar to cases in other states, such as California, Minnesota and Texas, where conflict with the Fourteenth Amendment equal protection clause was asserted recently.[1] Also present are questions of state constitutional law, namely, whether the equal protection and education clauses of the State Constitution are violated by New Jersey's statutory financing scheme.

Plaintiffs in this action include residents, taxpayers and officials of Jersey City, Paterson, Plainfield, East Orange and the Township of Berlin (Camden County).[2] They

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[1] *Serrano* v. *Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P. 2d 1241 (Sup. Ct. 1971); *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870 D. Minn. 1971) and *Rodriguez* v. *San Antonio Independent School District*, 337 F. Supp. 280 (W. D. Tex. 1971).

[2] Richard F. McCarthy of the Township of Berlin joined as a party plaintiff in lieu of proceeding with a similar action in Camden County. Counsel for plaintiffs in a recently commenced action in Monmouth County, *Loeb* v. *Rover*, filed a brief here as *amicus curiae*.

assert claims on behalf of all persons in New Jersey who have similar interests. Defendants include branches of the state Government and state officials who have or may have functions to perform in the enactment or administration of laws dealing with education and state financing.

The system of financing public education in New Jersey relies heavily on local property taxes. It produces wide disparities in educational expenditures. Plaintiffs contend that public school education is a state function which must be afforded to all pupils on equal terms. They contend that a "thorough" education is afforded to some pupils but denied to others, and that the system discriminates also against property owners who are taxed at different rates throughout the state for the same public purpose.[3]

The Attorney General, defending the constitutionality of our state statutes, concedes that differences in expenditures exist, and that inadequacies are present in some schools. He contends, however, that the statutory system is constitutional; that the "State School Incentive Equal-

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[3] Plaintiffs had also asserted a claim of *de facto* discrimination based on race or color, seeking changes in school district boundaries. This aspect of the case was served by stipulation and will be dismissed voluntarily, but without prejudice, if plaintiffs' principal attack on the financing system is upheld. A similar claim was asserted in *Spencer* v. *Kugler,* 326 F. Supp. 1235 (D. N. J. 1971). The court dismissed that action and the United States Supreme Court summarily affirmed on January 17, 1972, 404 U. S. 1027, 92 S. Ct. 707, 30 L. Ed. 2d 723, Douglas, J., dissenting. Part of this case is still on appeal in the Third Circuit Court of Appeals.

ization Aid Law," commonly known as the Bateman Act,[4] will increase state aid for certain deprived districts and will greatly reduce discrepancies caused by district wealth variations, that unequal expenditures do not necessarily prove unequal education, and that local control and responsibility to meet various interests justify the present system of shared funding. The court is urged to defer to the Legislature's judgment in an area as complex as education.

Public schools are financed primarily by local real property taxes augmented by various forms of "state aid," such as "formula aid," transportation aid, school building aid, lunch aid, etc., and federal aid. When this action was commenced in 1970, the State School Aid Law of 1954, as amended, was in effect. L. 1954, c. 85, as amended; N.J.S.A. 18A:58-1 *et seq.* This law included a "foundation program" consisting principally of minimum aid plus equalization aid, referred to as "formula aid" because it is based on a formula.

Under the foundation program formula each district received equalization aid of $400 per pupil less its "local fair share," and in any case not less than $75 (minimum aid) per pupil. N.J.S.A. 18A:58-5. Cities with population over 100,000 (Newark, Jersey City, Paterson, Camden, Tren-

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[4] L. 1970, c. 234, enacted October 26, 1970, effective July 1, 1971. This law adopted most of the recommendations of the State Aid to School Districts Study Commission, whose chairman was State Senator Raymond H. Bateman of Somerset County. The Commission's report, dated December 19, 1968, is referred to as the Batemen Report. The Commission was created by L. 1966, c. 32. There is now a Permanent Commission on State School Support, L. 1970, c. 233, N.J.S.A. 52:9N-1 *et seq.*

ton and Elizabeth) received an additional $27 per pupil L. 1966, c. 31; N.J.S.A. 18A:58-6.1; and by virtue of L. 1968, c. 301; N.J.S.A. 18A:58-6.2 all district received another $25 per pupil. Local fair share was defined as the equivalent of the amount of revenue that could be raised locally with a tax rate of $1.05 per $100 of equalized valuations (10½ mills per dollar). N.J.S.A. 18A:58-4.

Equalized valuations is the term applied to the true market value of taxable real property in a district as determined by the State Director of the Division of Taxation through studies of recent sales. N.J.S.A. 54:1-35.1 *et seq.* Under this law, aggregate assessments in each taxing district are adjusted to produce an equalized or true market value for the district. See *In re Appeals of Kents 2124 Atlantic Ave., Inc.*, 34 N. J. 21, 26-27 (1961). Equalized valuations are used to establish uniformity in the distribution of state aid despite unequal assessing practices. See *Switz* v. *Middletown Tp.*, 23 N. J. 580, 586 (1950).

Thus, under the foundation program, every district received $100 per pupil, plus the difference, if any, between $325 and the local fair share (plus $27, if the district was one of the six largest cities). My 1969-70, however, every school district in the State had annual budgets which exceeded the level "guaranteed" by the foundation program. The statewide average was over $800 per pupil. Today, two years later, the statewide average current expense per pupil is $1,009. All districts, therefore, had to finance the excess expenditure by local taxes, in addition to the local fair share. Some districts, of course, whose local fair share was high, received only the minimum aid of $100 per pupil.

Our principal concern is the Bateman Act, which was passed while this action was pending. The complaint was

amended to bring that act under attack. However, the foundation plan is still relevant because the Legislature funded the Bateman Act for 1971-72 at a "20%" level, defined as that amount which would have been paid in 1971-72 under the foundation plan, plus 20% of the difference between that aid and Bateman Act aid if Bateman were fully funded. N.J.S.A. 18A:58-18.1. For next year, 1972-73, this ratio has been raised to 40% L. 1971, c. 335, adopted December 7, 1971.

The details of the Bateman Act will be discussed later. This introduction is simply to show that the increase in formula aid under the Bateman Act in the first year has been negligible in most districts. Some poor districts received significant increases, however, especially those who benefited by the weighting factor in the formula for AFDC children (aid to families with dependent children.[5] However, relatively few school districts had an increase of $50 or more per pupil in 1971-72. Among the larger increases were $67.48 for Asbury Park, $80.41 for Camden, $109.82 for Newark, $98.51 for Trenton and $54.58 for Jersey City. The largest increase was $115.95 for Winfield Township, the poorest district in taxable property per pupil. Thus, under the present law school districts continue to raise the bulk of their funds by local taxes. On a statewide basis local taxes pay for about 67% of public school costs, federal aid is about 5%, and the balance (28%) comes from state funds.

In 1971-72 the principal items of state aid allocable to current expenses—formula aid under Bateman ($245,013,900), state transportation aid ($31,270,200), atypical pupil aid ($32,688,900), school lunch ($6,500,000) and

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[5] *Bailey* v. *Engelman,* 56 N. J. 54, 56 (1970), describes the nature and statutory basis of the AFDC program.

vocational education aid ($3,479,000)—constitute approximately 21% of the aggregate of all current expenses. Current expenses for all districts are approximately $1.5 billion.[6]

Fully funded and implemented, the Bateman Act would significantly improve upon the foundation plan in equalizing local revenue-raising power. However, school costs have been increasing at a rate of approximately 10% per year. The average increase is close to $100 per pupil annually. See *Basic Statistical Data of New Jersey School Districts, Bulletin A71-2* (July 1971), published by the New Jersey Education Association, hereinafter referred to as *NJEA Bulletin,* at page 14. Thus, increases in Bateman formula aid at "20%" increments per year will not offset the annual rise in school costs except, possibly, in a few districts. Accordingly, the statistics in Schedule A, annexed hereto, based in part on pre-Bateman data and in part on post-Bateman data, furnish a reasonable basis for evaluating the present system.

I. The School System

> There is also an artificial aristocracy, founded on wealth and birth * * *. The artificial aristocracy is a mischievous ingredient in government, and provision should be made to prevent its ascendency.
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> * * * At the first session of our legislature [in Virginia] after the Declaration of Independence, we passed * * * laws, drawn by myself, [which] laid the ax to the foot of pseudo-aristocracy. And had another which I prepared been adopted by the

[6] Other significant state appropriations in 1971-72 going toward local school costs are approximately $116 million for the teachers' pension fund and $30.5 million for school building aid.

> legislature, our work would have been complete. It was a bill for the more general diffusion of learning. This proposed to divide every county into wards * * * like your townships; to establish in each ward a free school for reading, writing and common arithmetic; to provide for the annual selection of the best subjects from these schools, who might receive at the public expense, a higher degree of education at a district school * * *. Worth and genius would thus have been sought out from every condition of life and completely prepared by education for defeating the competition of wealth and birth for public trusts.
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> —Thomas Jefferson,
> in a letter to John Adams,
> 1813.[7]

There are approximately 600 separate school districts in the State. Approximately 300 operate elementary schools only; approximately 200 districts operate a complete system of elementary and secondary schools, and 45 districts operate secondary schools only (such as grades 7-12 or 9-12). The balance includes 21 nonoperating districts (sending pupils to other districts and paying tuition), 20 county vocational districts, and 3 districts that operate special classes only for handicapped children.

There are 51 type I districts (N.J.S.A. 18A:9-2); the remainder, including regional (N.J.S.A. 18A:13-1 to 50) and consolidated (N.J.S.A. 18A:8-25 to 41) school dis-

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[7] Brown, Stuart G., ed., *We Hold These Truths* 114-116 (Harper & Brother, New York: 1941).

tricts, are Type II districts (N.J.S.A. 18A:9-3). In a type I district, members of the board of education are appointed by the chief executive officer of the municipality. N.J.S.A. 18A:12-7. In a type II district they are elected by the public at an annual school election. N.J.S.A. 18A:12-11. In all districts the board of education proposes the annual school budget. It is then submitted for approval to the voters at the school election in a type II district (N.J.S.A. 18A:22-23), or to the board of school estimate in a type I district (N.J.S.A. 18A:22-7).[8] If rejected by the voters in a type II district, the governing body must fix the budget. In a type I district, the board of school estimate may reject the proposed budget by certifying a lesser amount of money to the governing body. The municipal governing body must appropriate the amount certified, unless it exceeds 1½% of assessed valuations, in which case a lesser sum may be fixed. N.J.S.A. 18A:22-15, 17.[9] See *Board of Education, Elizabeth* v. *City Council, Elizabeth*, 55 N. J. 501 (1970); *Board of Education, East Brunswick Tp.* v. *East Brunswick Tp.*, 48 N. J. 94 (1966).

If the budget adopted by the governing body in a type I or type II district is less than that proposed by the board of education, that board may appeal to the State Commissioner of Education. The Commissioner may then

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[8] The board of school estimate is composed of the mayor and two other members of the municipal governing body and two members of the board of education. N.J.S.A. 18A:22-1.

[9] By 1969 approximately 75% of all type I districts had school budgets which exceeded 1-½% of assessed valuations. New Jersey Urban School Development Council, *The Status of Equal Educational Opportunity in New Jersey's Model Cities*, at 202, hereinafter referred to as *N. J. Model Cities Report*.

restore part or all of the budget cuts "within the limits originally proposed by the board of education" if he finds those funds are necessary to assure a "thorough and efficient" school system. See *East Brunswick, supra,* 48 N. J. at 107. In no case has the Commissioner fixed a budget which exceeded the local board's proposed budget, although he may have the power to do so.[10]

The State Board of Education has overall control and supervision of public school education in the State (N.J. S.A. 18A:4-10), and is authorized to adopt rules and regulations for carrying out the state school laws, N.J.S.A. 18A:4-15. The Commissioner is the chief executive officer of the State Department of Education. He is the agent of the State Board for all purposes. N.J.S.A. 18A:4-22. N.J.S.A. 18A:33-1 requires each school district to provide educational facilities and courses of study suited to the "ages and attainments" of all pupils. Our State Constitution (1947) requires a "thorough and efficient" system of education. Art. VIII, § IV, par. 1. With these provisions in mind, the Supreme Court in the *Elizabeth* case, *supra,* said:

> Thus it is the duty of the Commissioner to see to it that every district provides a thorough and efficient school system. This necessarily includes adequate physical facilities and educational ma-

[10] An early phase of this action concerned Jersey City's 1970-71 budget. The governing body had provided a "caretaker" budget which did not include money for teacher's salaries. An appeal was taken by the board of education to the State Commissioner of Education. He raised the budget to the amount originally requested by the local board. This court then entered an order, on defendants' application, compelling Jersey City to raise its share in accordance with the mandate of the Commissioner.

terials, proper curriculum and staff and sufficient funds. (55 N. J. at 506)

The State Board has adopted regulations which offer consulting services for the purpose of improving elementary school programs. However, no minimum curriculum or standards of achievement for elementary schools have been fixed by regulations, although authorized by statute. N.J.S.A. 18A:4-25. State control of instructional standards is exercised largely through certification of teachers and investigation of facilities and programs by office of the county superintendent of schools. The county superintendent is appointed by the Commissioner with approval of the State Board. N.J.S.A. 18A:7-1.

More control is exercised over secondary education. Local boards of education must develop a high school program and submit it to the State Board for approval. N.J.A.C. 6:27-4a. The program must be found sufficient to meet the needs of students to "stimulate each pupil to achieve the highest level of attainment of which he is capable." N.J.A.C. 6:27-4d. State regulations also require adequate staff, equipment and facilities and teaching loads that permit "a reasonable amount of attention * * * to the individual needs of the pupils." N.J.A.C. 6:27-8b.

The Commissioner has the power to direct the abandonment of part or all of a school building and to order alterations. N.J.S.A. 18A:20-36. The Commissioner, through county superintendents, has the power to withhold state aid from any district which does not provide suitable facilities and courses of study. N.J.S.A. 18A:33-2. However, the Commissioner has used these powers sparingly. Withholding state aid compounds problems whose major

source is inadequate funds in the first place. Closing outmoded school buildings without the funds to build a replacement presents practical difficulties. What will you do with the children? On rare occasions the Commissioner has condemned a high school program as totally inadequate. In one case this resulted in the formation of a regional district of adequate size and efficiency.

But the net of practical consideration is that the quality of education has been left largely in local hands. Local school boards and municipal officials obviously consider not only educational needs but also the sentiment of the taxpaying public. School budget rejections by voters are commonplace. In 1969 a record number of budgets were rejected, namely, 170 of 524, or 32.4%. *N. J. Model Cities Report, supra* at 205. Also, bonds for construction of school facilities have been voted down in 41% of all elections in 1969-70. Harold P. Seamon, Jr., "Bond Sales for Public School Purposes in New Jersey," *School Board Notes* (Sept/Oct. 1971) at 20. As a practical matter, therefore, budgets fixed by local boards have restrained the Commissioner's enforcement of our constitutional and statutory requirements for a thorough education. Local property taxing power is the primary force under public school education in our present system.

II. Fiscal Comparisons

> The people of this State constitute a commonwealth, and in the prosperity of this commonwealth all the citizens have an equal interest. * * *
>
> New Jersey recognizes the wisdom of this in assessing a uniform rate of tax upon each citizen for the support of her schools, in proportion to the

amount of property he possesses, and in apportioning the amount thus raised to the several school districts on the basis of their school census. * * *

Every true man * * * should be proud of his State * * *. He should rejoice to see all her children receive an education, whether they live in counties made wealthy by cities and by concentrated manufacturing industries, or in those still poor, with their primitive forests. If he has wealth, he should willingly give his share for the education of the children of the poor * * *.

—Ellis A. Apgar, State Superintendent of Public Instruction,
N. J. School Report, 1878.

The financial effects of our present system are shown in Appendix A. Appendix A includes approximately 25% of all operating districts in the State. Statewide averages and total enrollment are shown on the first line of page 1. Districts are arranged in each county in the order of highest to lowest in per pupil equalized valuations. The most recent data (1971-72) has been used where available. Some data which is two years old (1969-70) had to be used because more current data was not available. For example, teachers' salaries per pupil are 1969-70 figures. Since expense per pupil figures are for 1971-72, teachers' salary costs must be increased by approximately 20% because of inflation in order to correlate teachers' salary costs with current expenses. See *NJEA Bulletin,* at 14.

Districts listed in Schedule A include in most cases the highest and lowest in equalized valuations per pupil in each county, and a random sampling of districts in between, and one or two regional districts (column 1). Cur-

rent expense per pupil, estimated, 1971-72 (column 2) includes the cost of instruction, administration, transportation, maintenance, fixed charges (such as insurance costs and pension contributions) and certain sundry accounts. Debt service is not included. (Total statewide debt service in 1971 is estimated at $130 million, or $87 per pupil.) Professional staff per 1,000 weighted pupils, 1969-70 (column 5), does not use the weighting formula of the Bateman Act; it uses the weighting formula in the *NJEA Bulletin,* at 18, which is slightly lower and does not include a weighting factor for AFDC children. Professional staff includes special services, guidance and supervisory personnel, and administrators, equated to full-time positions. Equalized school tax rate (column 8) is the school tax levied (including any debt service payable by the municipality in type I districts) using equalized valuations. The sources of this data are noted below."

The most obvious aspect of Appendix A is district to district diversity. However, diversity alone may not prove differences in the quality of education. Many factors may account for differences in expenditure. Districts spend more for high school than elementary school programs; variations in the cost of living across the State may affect the cost of education; districts vary in size (Greater Egg Harbor Regional High School district is over 339 square miles while Victory Gardens in Morris County is 0.14 square miles). Transportation costs and certain fixed costs and capital expenditures may represent a higher per pupil expense in one district than another. Other fac-

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[11] Data in columns 1, 2 and 7 was furnished by the State Department of Education; data in columns 10 and 11 comes from records of the State Department of Education; column 3 was compiled from data in the *Nineteenth Annual Report of the Commissioner,* and columns 4, 5, 6, 8 and 9 are from the *NJEA Bulletin.*

tors may affect efficiency and costs, so that higher costs will not always connote better education. Moreover, differences in class size (as reflected in column 3 of Appendix A) may not appreciably affect the quality of education. Nor is teacher performance necessarily a direct reflection of his or her salary level.

Nevertheless, Appendix A shows a distinct pattern in every county in the State. In most cases, rich districts spend more money per pupil than poor districts; rich districts spend more money on teachers' salaries per pupil; rich districts have more teachers and more professional staff per pupil, and rich districts manage this with tax rates that are lower than poor districts, despite "equalizing" aid. The same conclusion was reached by Engelhardt, Engelhardt and Leggett, education consultants to The Committee to Study the Next Steps of Regionalization and Consolidation in the School Districts of New Jersey, *A Pilot Study of School District Reorganization* (1968), at 26-27, hereinafter called, *Pilot Study.* (The foregoing committee was appointed in 1967 pursuant to resolution of the State Board of Education. The committee's report of April 1969 is referred to as the *Mancuso Report,* after Ruth H. Mancuso, chairman.) The *Pilot Study* also reports (at 26) that there was a "direct relationship between equalized value per pupil and median teachers' salaries," with median salaries rising significantly when valuations per pupil exceeded $35,000 in 1965.

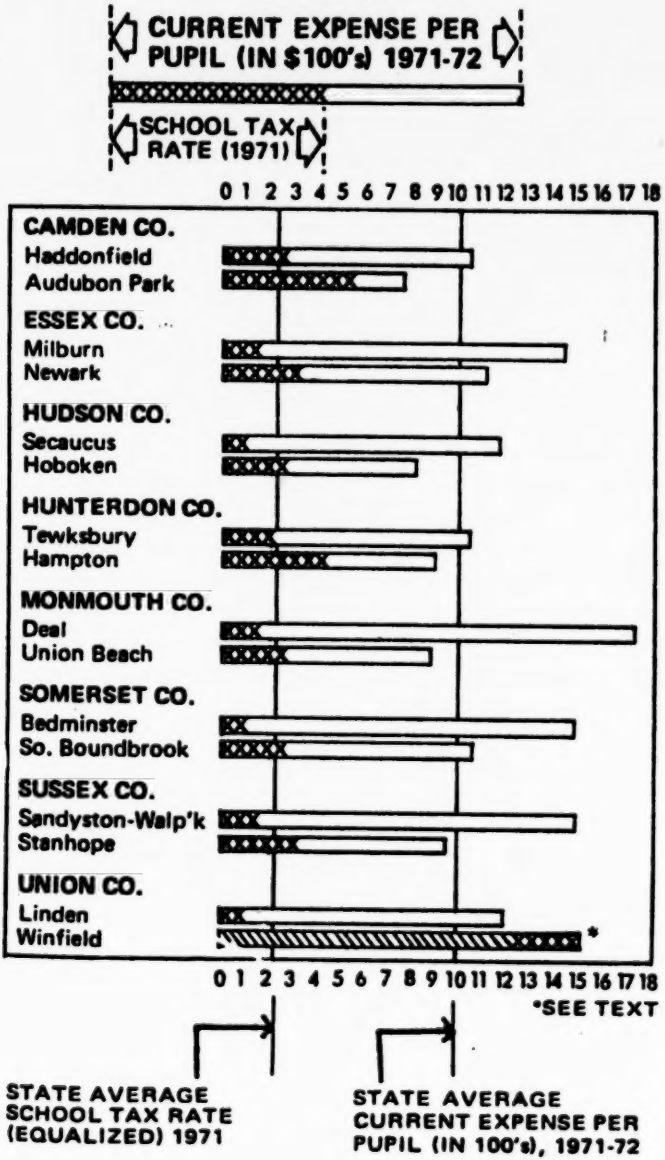
Figure I, on page 239, illustrates the relationship between valuations and expenditures per pupil and the inverse relationship between expenditures and tax rates. Figure I shows that districts with high valuations spend more money per pupil on education, but have lower tax rates, nevertheless. The poorest district in the State in

FIGURE I

[PHOTOSTAT]

(Opposite) ☛

FIGURE 1


CURRENT EXPENSE PER PUPIL (IN $100's) 1971-72
SCHOOL TAX RATE (1971)
0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
CAMDEN CO.
Haddonfield
Audubon Park
ESSEX CO.
Milburn
Newark
HUDSON CO.
Secaucus
Hoboken
HUNTERDON CO.
Tewksbury
Hampton
MONMOUTH CO.
Deal
Union Beach
SOMERSET CO.
Bedminster
So. Boundbrook
SUSSEX CO.
Sandyston-Walp'k
Stanhope
UNION CO.
Linden
Winfield
*
0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
*SEE TEXT
STATE AVERAGE SCHOOL TAX RATE (EQUALIZED) 1971
STATE AVERAGE CURRENT EXPENSE PER PUPIL (IN 100's), 1971-72

valuations per pupil, Winfield Township, is the last district depicted on the chart. Its bar is shaded differently to show a tax rate which exceeds in length that portion of the bar which represents expenditures per pupil.

Other characteristics tend to vary directly with valuations. Thus, with $1.43 school tax rate compared to $3.69 in Newark, Millburn has more teachers per pupil than Newark, spends more for teachers' salaries (1969-70) per pupil ($685 to $454), and has more professional staff per weighted pupil (61 to 53). In Camden County, Haddonfield and Audubon Park compare as follows: 18.9 to 27.2 pupils per teacher, $478 to $293 in teachers' salaries (1969-70) per pupil, and 55 to 44 in professional staff per 1,000 weighted pupils. Thus, Haddonfield gets more with a $2.33 tax rate than Audubon Park with a $5.59 tax rate. In Monmouth County, Deal and Union Beach compare as follows: 14.8 to 26 pupils per teacher, $717 to $328 in teachers' salaries (1969-70) per pupil, and 74 to 42 in professional staff per 1,000 weighted pupils. Both are grades K-8 districts.

Winfield Township in Union County is only 0.17 square miles in area. It has the lowest equalized valuations per pupil in the State, namely, $3,921. Despite this, its current expense per pupil for 1971-72 is $1,253, which is well above the state average. This includes approximately $500 per pupil in state aid. In 1971 the equalized school tax rate was $15.11 and the total equalized municipal tax rate was $20.14. This represents an extraordinary tax effort. It means that a taxpayer in Winfield Township pays an amount equal to the value of his residence every seven years just to raise money for school purposes, or every five years to raise money for school and all other

municipal services. (A tax rate in excess of 4% is considered counterproductive since investors can own property elsewhere at lower rates. Higher tax rates may become confiscatory.)

Winfield Township was incorporated by L. 1941, c. 360, composed of land lying in part in the City of Linden and, in part, the Township of Clark. Certain other small districts which have been created by legislative action also appear to be disadvantaged, economically. Victory Gardens in Morris County (0.14 square miles), incorporated by L. 1951, c. 259, has $13,023 in equalized valuations per pupil; and Audubon Park in Camden County (0.15 square miles), incorporated by L. 1947, c. 418, has $4,596 in equalized valuations per pupil. Their respective current expenses are $999 and $771 per pupil; in 1971 they had equalized school tax rates of $4.52 and $5.59, respectively. There was no evidence offered at trial directed specifically to these small districts. However, counsel have stipulated that a brief description of the origin of Winfield Township as revealed in an unpublished study may be included in the record.[12]

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[12] Winfield Township was studied in 1946 by Robert K. Merton, Patricia S. West, and Marie Jahoda of the Bureau of Applied Social Research, Columbia University. It was chosen because of the intense community and political life of its residents which developed in part by choice and in part because of problems confronting them at the outset. The following description of its origins is taken from this study entitled, "Patterns of Social Life—Explorations in the Sociology and Social Psychology of Housing."

Winfield Township was built as a mutual ownership community with federal funds furnished under the Lanham Act. It was a

(Footnote continued on following page)

Appendix A

The statewide spectrum of valuations and expenditures can be shown best, perhaps, by looking at the total number of pupils in various ranges, regardless of location. The following tables speak for themselves (county vocational and special class districts have been omitted):

(Footnote continued from preceding page)

"workers community" sponsored by an industrial union of shipyard workers in cooperation with the Federal Works Agency.

The development encompassed approximately 110 acres. Originally there were 700 families housed in 250 buildings, most of which were 3 or 4-unit, flat-roofed structures, and approximately 75 were single and two-family homes. When Winfield Township was first settled it had no school and its children were taken by bus to nearby districts whole limited facilities made them unwelcome.

The study states that nearby municipalities did not want to assume the cost of providing community or municipal services. The study concludes that Winfield Township, therefore, was "gerrymandered" by the Legislature into an independent township that had to develop its own government and municipal services.

Appendix A

TABLE I—VALUATIONS PER PUPIL

Equalized Valuations Per Pupil	*Number of Districts*	*Number of Pupils*
Below $10,000	4	10,593
$10-20,000	38	160,631
$20-30,000	107	288,611
$30-35,000	59	154,053
$35-40,000	64	151,419
$40-45,000	55	214,498
$45-50,000	68	168,109
$50-60,000	57	148,486
$60-90,000	84	163,144
$90,000 plus	42	25,743

TABLE II—CURRENT EXPENSE PER PUPIL

Expenditures Per Pupil	*Number of Districts*	*Number of Pupils*
Below $700	14	13,391
$700-800	54	83,917
$800-900	75	274,881
$900-1,100	248	631,975
$1,100-1,200	65	235,522
$1,200-1,500	106	215,948
Over $1,500	16	29,653

Appendix A

Other comparisons can be made. Industrial and commercial property distributions were studied by Neil Gold, Director of the Suburban Action Institute. He testified that 112 municipalities with 11% of the State population had commercial and industrial property almost equal in value to that possessed by a group of municipalities containing 39% of the State's population. The first group raised only $62 million in taxes compared with $262 million by the second group. The first group raised these taxes at a tax rate under 2% while the poorer groups taxed at rates of 6% or more. Yet most of the poorer communities must serve people of greater need because they have large numbers of dependent minorities, that is, blacks and those whose origin is Puerto Rican or Cuban. This may be illustrated by comparing nine municipalities that can be classified as "wealthy suburban" with five municipalities which may be termed "central city."

Appendix A

TABLE III—COMMERCIAL REALTY COMPARISONS

School District	*Commercial Property (millions)*	*1970 Population (thousands)*	*Black & Spanish Speaking Pupils (1969)*	*Equalized School Tax Rate (1971)*
Edison	$272	67	3.1%	1.16
Paramus	259	28	0.0%	1.90
Union Tp.	177	53	11.3%	1.32
Bridgewater-Raritan	162	30	0.9%	2.05
Berkeley Heights	137	13	0.1%	2.04
North Brunswick	115	17	3.0%	1.59
Mahwah	104	11	2.0%	1.63
East Hanover	85	7	0.2%	1.73
Englewood Cliffs	65	6	0.2%	1.20
Total	$1,376	232		
Newark	$665	380	81.7%	3.69
Jersey City	298	253	56.5%	2.82
Paterson	189	143	63.1%	2.57
Camden	130	101	70.8%	2.57
Trenton	109	102	73.2%	2.80
Total	$1,391	979		

Appendix A

Wealthy suburbs are able to attract industry from central cities by preferential tax rates. The erosion of the central city tax base makes it more difficult for these cities to raise revenues for school and municipal purposes. This condition has developed largely in the last 20 years. During that period, in 39 major metropolitan areas of the country 85% of all industrial and commercial growth, measured by jobs, has taken place in the suburbs. In New Jersey the rate has been 95%. The result is a declining tax base in older cities, in relative terms. Although the statewide average of equalized valuations per pupil rose from $30,112 in 1960 to $41,026 in 1971, some central cities suffered a decline in valuations per pupil in absolute or relative terms, or both. These trends are shown in Table IV below:

TABLE IV—VALUATION TRENDS

	Enrollment	*Equalized Valuations Per Pupil*
CAMDEN		
1960-61	17,829	$17,777.
1969-70	19,915	16,487.
JERSEY CITY		
1960-61	31,645	26,570.
1969-70	37,428	26,675.
PATERSON		
1960-61	21,956	21,000.
1969-70	25,874	23,021.

Appendix A

	Enrollment	*Equalized Valuations Per Pupil*
PLAINFIELD		
1960-61	8,529	26,771.
1969-70	9,116	30,943.
EAST ORANGE		
1960-61	8,797	37,533.
1969-70	10,148	32,152.
STATE		
1969-70	1,055,085	30,112.
1969-70	1,448,686	38,172.

Rising tax rates in cities compel compromises in funding services for education and other purposes. Nor is this trend likely to be reversed in the near future. What is more important and harmful is the separation of classes of people which has occurred in recent years. Social isolation aggravates the impact of economic differences in education. See *Booker* v. *Board of Education, Plainfield,* 45 N. J. 161, 170, 171 (1956).

There are, of course, many districts of low wealth other than central cities. But the plight of the older city, in which large numbers of black and other deprived minorities are isolated, presents an especially acute educational challenge. See Carl A. Marburger, "Considerations for Educational Planning," in A. Harry Passow, ed., *Education in Depressed Areas* (Bureau of Publications, Teachers College of Columbia University, New York

1963), at 298. (Dr. Marburger is now the Commissioner of Education of New Jersey.) Of course, the State and Federal Governments have recognized the problem. Added school aid from both sources has been made available to these cities in recent years.[13] For a comprehensive survey of older city problems, see *N. J. Model Cities Report, supra.*

The decision in this case, however, does not turn upon the special needs of older, larger cities. The problems

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[13] Total federal aid for district programs as well as state administration was about $95 million in 1970-71, plus 12 million for areas affected by federal activity. The largest segment was in Title I funds (Elementary and Secondary Education Act of 1965, Title I, *Public Law* 89-10, as amended), $43 million in statewide total.

Examples of municipalities receiving substantial amounts of Title I funds are (In thousands):

Camden	2,660	Morristown	101
Atlantic City	$1,165	Newark	9,046
Deptford	116	North Brunswick	581
East Orange	631	Orange	289
Elizabeth	891	Passaic	587
Englewood	196	Paterson	2,286
Franklin Tp.	173	Perth Amboy	406
Jersey City	2,787	Phillipsburg	114
Hoboken	710	Plainfield	452
Lakewood	302	Pleasantville	238
Long Branch	389	Salem	135
Millville	163	Trenton	1,706

presented by the school funding system in New Jersey confront many poor suburban and rural districts as well.

Thirty-two school districts in New Jersey with an enrollment of less than 2,000 pupils each have equalized valuations per pupil under $20,000; 71 more school districts with less than 2,000 pupils each have between $20,000 and $30,000 in equalized valuations per pupil. Thus, 103 small school districts have valuations per pupil of less than $30,000 at a time when the state average valuation per pupil is over $41,000. Of these 103 small districts, 72, or approximately 70%, spend less than $900 per pupil for current expenses at a time when the state average is $1,009. Bear in mind that the state averages are brought down by the poorer districts. This may have reflected itself in the testimony of Dr. Edward Kilpatrick, Assistant Commissioner in charge of the Division of Administration and Finance. State Department of Education, when he said that $1,200 per pupil would fund a fine educational program, looking at dollars alone.

Table II above shows that only 21% of all school districts, with 17% of the statewide enrollment, have current expense budgets of $1200 or more. On the other end of the scale are 143 districts, with 372,189 pupils, or 25% of statewide enrollment, with current expense budgets under $900. One district, Tabernacle Township in Burlington County, a K-8 district with 511 pupils, has a current expense budget of $561 per pupil. This is the lowest expenditure in the State. As will be shown later, the Bateman Act offers the least aid to poor rural and suburban districts which have a low AFDC population component.

Appendix A

III. Quality of Education

"Come, Tom," said Mother,
"Are you ready for school?
Are you ready, Betty?
Run to school, Tom.
Run fast, Betty."

—Ousley and Russell,
On Cherry Street
(a Ginn "basic reader".)

The quality of elementary and secondary education in New Jersey probably runs from good to excellent in the vast majority of school districts. In some it is not simply poor, it is inadequate. Unfortunately, this case deals with the problems we have, not our successes.

The Commissioner of Education does not systematically test achievement levels of students although he is authorized by N.J.S.A. 18A:4-24 to do so in order to ascertain the "thoroughness and efficiency" of any public school. The Commissioner apparently hears about certain problem schools from county superintendents who know where the trouble spots are. High school programs are approved by the Department of Education, and these schools are examined by state teams every five years. However, there is no published general evaluation of the condition of education in New Jersey. One may wonder why this is so when we are dealing with the most important function of our government, spending over $1.7 billion per year on our most valuable asset, the children of this State. An evaluation system can be readily devised.

Appendix A

Each school could be required to administer tests and submit reports of some uniform type so that comparisons could be made. In any case, the closest we came in the testimony was by one witness, Joseph Clayton, a former Assistant Commissioner and, for a time, Acting Commissioner. He testified that about 20% of our school districts have schools that furnish inadequate education, though not necessarily all schools in the district. No estimate was given of the number of pupils involved. These schools are in poor rural areas, in old cities, and in poor suburbs as well.

If nationwide comparisons are of any help, 1970-71 figures show that New Jersey ranks high, third in the nation, in current expenditure per pupil. Only New York and Alaska were higher. New Jersey ranked sixth in average salaries of secondary school teachers ($10,250) and eighth in average salaries of elementary school teachers ($9,875). Research Division, National Education Association, *Rankings of the States, 1971* (Research Report 1971-R1), at 21, 22, 62. These rankings are consistent with the wealth of New Jersey residents: third in personal income per child of school age ($17,087) and seventh in per capita personal income ($4,241) in 1969. *Ibid.* at 30, 32.

But averages conceal disparities. The question is not how well we are doing on the average; the question is whether New Jersey's system of financing public schools creates impermissible disparities between rich and poor districts in educational opportunity, as well as tax burden. The Attorney General disputes the conclusion that mere differences in dollar expenditures prove differences in the qaulity of education. He doubts the ability of the

court to grapple with an issue as large and complex as the public school system; and there is some merit to both of these contentions. However, based on probabilities and expert opinion, in this as well as other kinds of cases, some conclusions can be drawn. As might be expected there is a correlation between dollar expenditures and input (such as teachers and facilities), and between input and output (results).

The criteria proposed by the State Board and the Permanent Commission (see note 3) for classifying districts under the Bateman Act (to be discussed later) include input and output measurements. In budget appeals the Commissioner himself decides on a case by case basis what funds are necessary for a "thorough" education and what are not. In doing so he looks at the proposed use for the funds and the specific needs claimed. He also examines statistics in those categories which are included in Schedule A as some general gauge of the quality of education in the system. For example, in the 1969 budget appeal by the Board of Education of Englewood Cliffs, seeking to restore funds rejected by the voters and the governing body, the Commissioner noted that Englewood Cliffs was among the highest in expenditures per pupil, salary schedules, facilities and equipment, and had one of the lowest pupil-staff ratios in the State. *New Jersey School Law Decisions* (1969), at 105. It is one of the few districts with closed-circuit television. The Commissioner found that these were the products of high community aspirations and a very favorable tax base. The Commissioner decided that Englewood Cliffs was spending enough, and he refused to restore any of the budget cuts.

Appendix A

How much is enough may be difficult for anyone to answer. However, it is less difficult to decide when input and output both are inadequate.

The principal ingredient in good education is good teachers. This, of course, is hard to measure statistically. One witness tetified that high intellectual and verbal skills of a teacher are invariably associated with good teaching and good results. However, there are no available statistical comparisons of this quality in our teachers. Other measures have to be used for the purposes of this case. We have already noted that poorer districts have fewer teachers and less professional staff per pupil. A great enough difference may make the task of some teachers more difficult, allowing for less specialization and less preparation time for each subject. Some evidence was also submitted showing that wealthy districts have a higher percentage of teachers with advanced degrees. For example, the percentage of teachers with a master's degree in Millburn is 47%, in Princeton Regional 41%, and in Englewood 39%. In Jersey City it is 23%, Newark 18%, and Camden 13%. *The Pilot Study, supra,* at 27, found that only one school district with equalized valuations of less than $30,000 per pupil in 1965 had a staff of which 30% or more had a master's degree. The evidence also shows that there is more teacher turnover in the poorer districts, with teachers leaving for more attractive school systems in wealthy suburban areas. These aspects allow some correlation between the quality of teaching and the wealth of the district, even though one does not need a master's degree to be a good teacher.

Other input factors include school buildings, equipment, text books and library facilities. There is ample evidence

to show the correlation between wealth and the quality of these facilities, and that severe inadequacies exist in many poor districts.

In Paterson 7 of 26 elementary schools in use were built between 1887 and 1899. Many buildings do not meet state standards for lighting and safety equipment. Only two or three schools have a library or librarian. Cafeteria and recreation areas are inadequate. Similar conditions can be found in other districts. In East Orange, where 54% of the population is black but 90% of pupil enrollment is black, 8 to 12 buildings were built before 1914, including one in 1873 and one in 1893. Instructional space equivalent to 76 classrooms is located in basement and attic areas, and 19 relocatable classrooms are in use. These substandard classrooms serve approximately 2,000 pupils. In Plainfield the health room in one school has no sink or toilet.

In the City of Camden 8 of 34 schools in use (over 20%) were built between 1874 and 1897. Some are three-story wooden frame structures. In some, lighting, ventilation and toilet facilities are inadequate. A study of the Camden school system by the State Department of Education was compiled in November 1969. The report, here called the *Camden Survey,* concludes at page F-39 that almost all elementary schools in Camden are deficient in facilities for desirable programs such as art, music, science, home economics, etc. Also needed are suitable libraries and special services such as remedial reading, speech therapy and psychological assistance. Camden has 23 school buildings on sites of one acre or less. This precludes outdoor educational programs.

Again, deficiencies are not limited to schools in the older cities. Inadequacies due to lack of financing exist in other areas of the state. For example, Pine Hill is a K-6 school district in Camden County, with 874 pupils in three schools. Pine Hill may fall somewhere between a rural area and a suburb. Pine Hill has equalized valuations per pupil of $13,354 and a school tax rate of $3.52. Even with state aid of over $300 per pupil, the present current expense budget is only $691 per pupil. Dr. Mark Hurwitz, Executive Director of the New Jersey School Boards Association (see N.J.S.A. 18A:6-45), was superintendent of schools of Pine Hill from 1965 to 1967. He testified that Pine Hill's budget was voted down every year since 1954. When two submissions were required the electorate voted the budget down twice in the same year, even after it was pared down.

Dr. Hurwitz had to serve in two capacities, school superintendent and the principal of one school. There was no trained librarian in the system. In one school there was a closet with books that served as a library. Some science text books dated back to the 1940's, before astronauts had been heard of. There was no guidance counsellor or speech therapist. A psychologist was available one day a month. Special program aids were virtually nonexistent. Pupils who were either gifted or below average could not get special instruction or materials, unless they qualified as handicapped, because Pine Hill could not afford options to meet special needs. Teacher recruitment was difficult. Five teachers operated on emergency certificates without a college degree. Two such teachers have taught in the system for more than 20 years. Not one teacher had an advanced degree.

Appendix A

Pupils from Pine Hill went into the Lower Camden County Regional district (grades 7-12) which took pupils from seven elementary school districts. Those from Pine Hill had difficulty competing with other pupils, even with those from districts that were not much wealthier. A large percentage of Pine Hill pupils scored below national norms in tests for reading achievement and basic skills. Dr. Hurwitz concluded that the education in Pine Hill was inadequate due to insufficient funds.

Other evidence was offered to show adequate education, both in terms of input and output. In Jersey City tests showed that average results at the end of the first grade were at the national norm but fell substantially below the national norm at the end of the seventh grade. A similar decline was shown by tests in Plainfield. This was interpreted as a failure of the system, since pupils able to learn at national norm levels do worse after being in the system for a number of years. There was evidence that a substantial number of pupils graduating from inadequate school systems are functional illiterates who cannot properly read and understand writing in normal use, such as employment applications. A substantial portion of the students in the Camden City system cannot "read well, think well and work well," and some are illiterate, according to the *Camden Survey,* pages II-5 and III-8, 9.

In Camden, in 1968-69, 287 of 945 teachers had substandard teaching certificates—86 in secondary schools and 201 in elementary schools. *Camden Survey,* at P-4. There were only two Puerto Rican teachers in a system with 2,000 Puerto Rican students. Of 1,879 nonEnglish speaking children only 240 received instruction in English. In Paterson there are eight bilingual teachers for 4,000 Spanish-speaking children, a ratio of 1 to 500.

Appendix A

Naturally, the focus here is upon glaring, exceptional deficiencies. But indications are that they may occur more often than we would like to believe. It is difficult to imagine that in the 1960's a history book used in one lower school did not mention World War II, because, when the book was published, that war had not yet taken place. But such was the testimony of a former teacher. (How much can new books cost?) Also, in one school, classroom books could not be taken home because, old and torn, there was only one set of books, and several classes had to share them on the same day. Accordingly, if this opinion does not discuss theories of education, the importance of early schooling, or tenure and lock-step salary ranges and their effects upon teacher performance, it is for obvious reasons.

Not all shortcomings are the fault of the school system. The learning of a pupil from a deprived environment is impeded by many factors. For example, many pupils come to school hungry, or have uncorrected sight or hearing defects that would interfere with learning. Some students have migrated from even more inadequate school systems. But there is ample evidence in the record that these limitations can be offset significantly by improved educational offering. Better physical examinations and follow-up is a simple example of how a school can overcome a learning handicap. Testimony in support of the more general conclusion was given by a number of witnesses, including Professor James W. Guthrie of the University of California and Henry M. Levin, Associate Professor in Economics and in Education, Stanford University. See Guthrie, Kleindorfer, Levin & Stout, *Schools and Inequality* (M. I. T. Press, Cambridge, 1970), a study for The Urban Coalition, first published in 1969.

Appendix A

Professor Henry S. Dyer, of the Educational Testing Service of Princeton, New Jersey, testified that pupil achievement is positively related to per pupil expenditure for instructional purposes. He estimated that the relationship is, roughly, on the order of .4 in correlation coefficient. This means that by his estimate per pupil expenditure is associated with about 16% of the variation in average pupil achievement. This is a positive but not a strong correlation. Others, including Guthrie and Levin, apparently see a higher degree of correlation. Professors Levin and Guthrie do not say that more money alone will make a difference. More money properly spent on proper programs can make a difference. Higher teacher salaries should enable a district to select teachers and supporting staff who are better fit for the needs of its pupils. More money can give districts options to attack their problems in ways not available to them now.

I am aware of the qualified doubts about the dollar-input-output relations raised by the so-called *Coleman Report*. J. S. Coleman, *et al., Equality of Educational Opportunity* (U. S. Printing Office, 1966). The report concludes (at 325) that family background and the social composition of the student body are the primary determinants of achievement in school.[14] The conclusions of the

[14] The report concludes:

That schools bring little influence to bear on a child's achievement that is independent of his background and general social context; and that * * * the inequalities imposed on children by their home, neighborhood, and peer environment are carried along to become the inequalities with which they confront adult life at the end of school. For equality of educational opportunity through the schools must imply a strong effect of schools that is independent of the child's immediate social environment, and that strong independent effect is not present in American schools. [at 325]

Coleman Report have been disputed, and the methods of analysis and measurement that underly the findings have been criticized. See Guthrie et al., *Schools and Inequality, supra,* at 92, 96-99. In fact, more recently Dr. Coleman has applauded the concept of equalizing educational offering by equalizing financing power and tax effort through methods proposed by Professor Coons and his associates. Coons, Clune and Sugarman, *Private Wealth and Public Education, infra,* Foreword, at vii to xvi. The Coleman Report itself states (at 22) that "improving the school of a minority pupil may increase his achievement more than would improving the school of a white child increase his. Similarly, the average minority pupil's achievement may suffer more in a school of low quality than might the average of white pupils." So far as this court is concerned, the only evidence offered in the case does show correlation between educational expenditures and pupil achievement over and above the influence of family and other environmental factors.[15]

Chapter 4 of *Schools and Inequality, supra,* reviews 17 studies which attempt to determine the effects of schooling exclusive of a pupil's social environment. The authors note the difficulty of isolating environmental and congenital characteristics which affect a student's performance. These influences have a strong impact on the student even before he enters school for the first time. Nevertheless, a number of studies conclude that school services are significantly related to pupil achievement. One of the

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[15] It may well be that part of the *Coleman Report* must be given effect and that to equalize educational opportunity significantly *de facto* segregation of minority pupils must be overcome in addition to equalizing funds and facilities.

early studies performed by the Educational Testing Service of Princeton[16] shows a direct correlation between pupil performance and school services such as (1) the number of special staff (psychologists, reading specialists, counsellors) in the school, (2) class size, (3) pupil-teacher ratio and (4) instructional expenditures per pupil. Other studies show a positive correlation between pupil performance and teacher characteristics (such as verbal ability, experience, salary level, academic preparation, etc.) and access to teachers (size of class, length of school year, etc.). The school environment, such as the age, size and type of facilities available, also affects learning, but to a lesser degree. Because the foregoing components can be translated into dollar costs, Professor Guthrie and his associates concluded that expenditures per pupil and teacher salary levels are significantly correlated with pupil achievement. Better education does make a difference regardless of the child's social environment.

Dr. Dyer submitted charts (P-23 in evidence) which show a correlation between per pupil expenditures and various gauges of performance, such as SAT scores and truancy rates. Figure VI of this exhibit shows the results of a controlled experiment in Hartford, Connecticut ("Project Concern") in which 266 elementary school children selected at random were transferred from five depressed inner city schools to 35 elementary schools in affluent suburbs. A group of 305 similar students remained in the inner city schools to serve as a control group. Results were then tested by gain or loss of I. Q.

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[16] Mollenkopf and Melville, "A Study of Secondary School Characteristics as Related to Test Scores," (Research Bulletin 56-6, 1956, mimeo).

scores. The experimental group transferred to the suburbs presented a median gain for pupils in six grades (1 through 6) from the spring of 1967 to the spring of 1968 of 5.2 as compared with a median gain of 3.2 for the inner city group. Five of six grade groups transported to the suburbs made significantly greater gains in I. Q. than their counterparts in the city. (One group, grade 5, declined for unexplained reasons.) Grade 1 pupils in the suburbs gained 8.2 as compared with 3.0 for the city group.

Other testimony supported similar conclusions. Some studies show that students in depressed areas whose schools have received substantial improvement under federal aid programs have achieved better than similar pupils in the same city attending schools which have not been changed. This result has been reported for Washington, D. C., as well as Jersey City.

That dollars can make a significant difference in pupil performance is the premise of the *Camden Survey, supra,* made by our State Department of Education. The *Mancuso Report, supra,* also concludes (at 9) that while "many communities are unable to adequately educate their youngsters, it is equally clear that many others are eminently successful. * * * Although there are some excellent small districts in the state, almost all evidence points to a correlation between enrollment, wealth, quality education and efficiency."

Limitations in this type of case, dealing with the system as a whole rather than problems of a given district, make it impossible to treat many aspects in the dollar-quality equation. To what extent can the consolidation of districts expand the range and quality of instructional

opportunity without greatly changing costs? See *Mancuso Report, supra.* To what extent are high drop-out rates in central cities a reflection of unstimulating instruction, or other forces? Why do students from our deprived schools who *want* to go to college score appreciably lower in their SAT's than students from wealthy suburban schools? Should teachers get "combat pay" in some schools? Vocational training has not been explored in the case, but statistics in the *NJEA Bulletin,* p. 31, suggest that county vocational schools have not reached enough pupils who could profit by this type of training. There was testimony on other points that I cannot dwell upon. One example is the self-fulfilling negative attitdue of middle-class teachers toward students of low socioeconomic status. Also discussed was the low self-esteem of children from poor neighborhoods who begin their first contacts with American government by entering ancient, dilapidated buildings. Perhaps they ask themselves, "Is this what my state thinks of me?" (In school they are given a primer which shows a white house surrounded by neat, green lawns. It reads, "Are you ready for school, Tom? Run to school, Tom. Run fast.") In any case even new schools won't take these children out of depressing neighborhoods. As was said recently about a black ghetto, the people who lived there "hated it so much that they had burned down a lot of it * * *. It was all they had, and they'd wrecked it." Kurt Vonnegut, Jr., *Slaughterhouse-Five or The Children's Crusade,* at 51 (Delta Books, New York, 1969).

Questions are asked because we do not have all the answers. Some conclusions, however, can be drawn on the specific issues of this case. Assistant Commissioner Edward Kilpatrick testified that his office had participated in the *Camden Survey, supra,* and wrote the following:

> With this dependence upon local property taxes for the support of such services in New Jersey, it is inevitable that the children in the poorest communities do not have the same educational opportunities as those in the more affluent districts. (At H-2.)

The same report concluded (at III-3) that state aid under the foundation program is not sufficient to permit substantial improvement.

Clearly, a large number of New Jersey children are not getting an adequate education. This is caused in part by insufficient funds in many districts despite high taxes. On the other hand, many districts provide superior education with less tax effort. More money should make a significant difference in many poor districts. However, the problems in older cities with a large minority population are more complicated. It is too much to expect that our school system alone can solve all these problems. But much can be done, and doing more will cost more. Education is no exception to this fact of life.

IV. The Education Clause and the Bateman Act

> Between the idea
> And the reality
> Between the motion
> and the act
> Falls the Shadow
>
> —T. S. Eliot,
> "The Hollow Men."

A. The Bateman Act

The essential features of formula aid under the Bateman Act consist of "minimum support aid" and "incentive equalization aid." N.J.S.A. 18A:58-5. Both are de-

termined on a weighted pupil basis, and both are designed to vary according to the classification of a district. The act provides for classification in five categories, from basic to comprehensive, depending on the quality and scope of the educational program offered, with higher levels of aid offered as an incentive to program improvement through higher expenditures. See *Bateman Report* at 48 49. Since the Bateman Act has not been fully funded, however, all districts are being treated as basic districts. The Legislature has continued this uniform classification for 1972-73 (L. 1971, c. 335, *supra*), and none can qualify for higher state aid based on higher classifications. Moreover, the classification criteria have not yet been adopted. Criteria formulated by the Commissioner with the approval of the State Board have been rejected by the Permanent Commission on State Support. Other criteria have been proposed. When agreement is reached the criteria are to be submitted to the Legislature for enactment. N.J.S.A. 18A:58-3.

"Minimum support aid" and "school district guaranteed valuation" are both based upon the number of resident weighted pupils of the school district. N.J.S.A. 18A:58-2. Pupils are weighted to reflect varying costs of education according to grade levels. N.J.S.A. 18A:58-2; *Bateman Report* at 4. The principal categories of weights adopted by the Legislature are:

Kindergarten pupils,	.75 units
Elementary pupils (grade 1 through grade 6),	1.0 units
Senior and 4-year high school pupils (equated to full time),	1.3 units

Appendix A

Additional weight is given for AFDC children (children in families residing in the school district who receive assistance under a program of aid to families with dependent children) between the ages of 5 to 17, inclusive, who reside in the district. Whether attending school or not, each such child counts as an additional .75 units in determining the number of weighted children for the school district. N.J.S.A. 18A:58-2; *Bateman Report* at 48. Weighting increases aid to districts whose weighted enrollment is greater than actual enrollment. A 10% increase in pupils due to weighting will increase minimum aid and guaranteed valuations by 10%.

'State aid" under the Bateman Act is defined as minimum support aid, incentive equalization aid, transportation reimbursement, atypical (handicapped) pupil reimbursement, county aid and vocational school aid. N.J.S.A. 18A:58-2.[17] All districts receive minimum support aid.

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[17] The School Building Aid Law was also amended by the Bateman Act. This aid, for debt service and capital outlay (as well as capital reserve fund), was amended to include the same weighting basis per pupil (including the AFDC factor), but not to exceed $45 per weighted pupil in resident enrollment, and subject to a local share equal to $.075 per $100 of equalized valuations. This law is also subject to the 20% funding provision. N.J.S.A. 18A:58-18.1. Under the "emergency" Building Aid Law of 1968 (L. 1968, c. 177, as amended by L. 1969, c. 136, L. 1970, c. 125 and L. 1971, c. 10) an additional sum not exceeding $25 per pupil is also available for debt service only for those districts found by the State Board of Education to be incapable of providing necessary school facilities (N.J.S.A. 18A:33-1) to satisfy the school laws, N.J.S.A. 18A:58-33.2 *et seq.* In 1972-73 building aid ($29.7 million) and emergency aid ($7.4 million) will approximate 27% of the annual debt service costs on local districts.

This is $110 per weighted pupil in a basic district. If the law is implemented by new legislation to establish classification criteria, minimum support aid will be increased in steps of $12.50 each for a limited district, an intermediate district, a pre-comprehensive district, and a comprehensive district reaching the maximum of $160 per weighted pupil.

"Incentive equalization aid" is given to a district whose actual equalized valuation per pupil is less than the guaranteed valuation per weighted pupil based on the district's classification. In a basic district total "guaranteed valuation" is a sum equal to $30,000 multiplied by the number of resident weighted pupils of the school district. The guaranteed valuations are to be increased in increments of $3,750 for each classification, reaching a maximum of $45,000 per weighted pupil in a comprehensive district.

The formula for determining incentive equalization aid is set out in N.J.S.A. 18A:58-5. First, you compare the "guaranteed valuations" with equalized valuations of the district. If the equalized valuations are more than the "guaranteed valuations," no incentive equalization aid is paid. If equalized valuations are less than the "guaranteed valuations," incentive equalization aid is paid in addition to minimum support aid, calculated as follows: The "net operating budget" is first determined. This is defined as the current expense budget minus all estimated revenue, such as minimum support aid, transportation aid, federal aid, if any, etc. The "net operating budget" is then divided by total guaranteed valuations. The result is the district's school tax rate. That tax rate is then multiplied by the equalized valuations of the dis-

trict to obtain the local tax requirement. The same tax rate is multiplied by the excess of guaranteed valuations over equalized valuations of the district to obtain the incentive equalization aid payable by the State.

Table V which follows depicts various tax rates that would obtain in a school district depending upon the current budget and the equalized valuations of the district. For purposes of illustration I have assumed districts with equalized valuations of $20,000, $30,000, $45,000 and $60,000 per pupil, and I have assumed that a district chooses to spend $1,000, $1,200 or $1,400 per pupil. The weighting factor of 1.10 was assumed as a general average for all non-AFDC districts. See statewide pupil distribution data in the Commissioner's *Nineteenth Annual Report* (1969-70), at IX. Also, to determine the net operating budget, a deduction of $50 per pupil was assumed arbitrarily to represent other district revenue, such as transportation aid and federal aid, other than formula aid. Tax rates were computed for each district as a basic district as well as a comprehensive (Comp.) district.

Appendix A

TABLE V—TAX RATES UNDER THE BATEMAN ACT

District Equalized Valuation Per Pupil	*Annual Per Pupil Expenditure*					
	$1,000		*$1,200*		*$1,400*	
	Tax Rate		*Tax Rate*		*Tax Rate*	
	Basic	*Comp.*	*Basic*	*Comp.*	*Basic*	*Comp.*
$20,000	2.51	1.56	3.12	1.97	3.72	2.37
$30,000	2.51	1.56	3.12	1.97	3.72	2.37
$45,000	1.84	1.56	2.29	1.97	2.73	2.37
Adjusted for 1.434 Weighting, Including AFDC[18]						
$60,000	1.38	1.29	1.71	1.62	2.05	1.96
$20,000	1.84	1.12	2.31	1.43	2.77	1.74
$30,000	1.84	1.12	2.31	1.43	2.77	1.74

Using a basic district as an example, with equalized valuations of $20,000 per pupil, calculations under the formula can be simplified as follows:

Select the current total expense per pupil ($1,200); subtract $121 (minimum aid per pupil of $110, raised 10%

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[18] The weighing factor of 1.434 was derived by averaging current Jersey City and Camden enrollments and AFDC population figure. Camden's enrollment of 20,436 is increased by units for AFDC children (which adds 10,588 units) and units for grade levels, to a total weighted enrollment of 32,572. Jersey City's enrollment is approximately 39,000; its AFDC factor adds 10,642 units; the total weighted enrollment is 52,328. The average weighted enrollment in Jersey City and Camden combined is 1.434 units per resident pupil.

due to a 1.10 weighting factor) and also subtract $50 (representing other revenue, such as transportation aid). This leaves $1,029 to be raise dby local taxes and state equalization aid. Divide $1,029 by $33,000 (the guaranteed valuation of $30,000 raised by 10% due to a 1.0 weighting factor) to get a tax rate of 3.12%. Thus, the amount to be raised by local taxes is 3.12% of $20,000, or $624. State equalization aid is $1,200 minus $121 (minimum support aid), minus $50 (other revenue), minus $624 (local revenue), or $405 per pupil. This is equal to 3.12% of the difference between equalized valuations per pupil ($20,000) and guaranteed valuations per weighted pupil ($33,000). Thus, this assumed basic district, spending $1200 per pupil, will raise $624 locally at a tax rate of $3.12 per $100, and will receive $121 in minimum support aid, plus $405 in state equalization aid, plus $50 in other revenue. Under the foundation plan this district would have received $215, *i.e.*, $100 minimu maid plus $115 in equalizing aid (plus $27 if one of the six largest cities) per pupil. First-year Bateman aid would be $215 plus 20% of $311, or $215 plus $62.20. $311 represents the difference between Bateman aid fully funded ($526) and the foundation plan formula aid of $215, based on my assumed model.

Under the Bateman formula fully funded, excluding an AFDC weighting factor but assuming an average weighting factor of 1.10, basic districts are in effect guaranteed equalized valuations per pupil of $33,000. Districts with $33,000 or less in equalized valuations per pupil will have the same tax rate. Every basic district with more than $33,000 in equalized valuations per pupil, and with the same budget, will have a lower tax rate. Thus, the Bateman Act continues to employ a wealth-based formula. It

differs from the foundation plan in that Bateman includes a weighting factor and allows relatively poor districts to receive, in addition to minimum support aid, a higher share from the State in proportion to the total expenditures of the district. Under the foundation plan the State participated only to the extent of a given level of expenditures, namely, $425 per pupil (plus $27 for the six largest cities).

Districts with a high proportion of AFDC children will receive more minimum aid and a higher effective guaranteed valuation per pupil. Table V above shows the results of a weighting factor of 1.434 units in an assumed high AFDC district. The figures were computed, as indicated in note 18 above, by using the average of current Camden and Jersey City enrollments and AFDC populations. The effect of this weighting factor is to increase minimum aid by 43.4% to $157.74 and to increase the guaranteed valuations per pupil by 43.4%, from $30,000 in a basic district to $43,020. Thus, a basic district with a high AFDC population spending $1,200 per pupil will have a tax rate of 2.31%, approximately equal to the tax rate of a basic non-AFDC district with equalized valuations per pupil of $45,000.

The AFDC weighting factor would have an appreciable effect under Bateman fully funded. *N. J. Model Cities Report, supra,* states (at 19) that the total number of AFDC children in the State increased from 25,000 in 1965 to 72,000 in 1969-70. The Department of Education reports that the total number of AFDC children in the state is now 198,000. However, receiving increased formula aid or federal aid because of AFDC children should not be viewed as a windfall. It should cost much more to provide an adequate education in districts, such as Jersey City and Cam-

den, where AFDC children between the ages of 5 and 17 are equal in number to roughly 30% to 60% of the total school enrollment. See note 18 above. This increased cost was appreciated by the Bateman Committee. The *Bateman Report states*

> It is now recognized that children from lower socio-economic level homes require more educational attention if they are to progress normally through school. When the additional compensatory education is provided, it results in *substantially higher costs. The weighting* of the children from the lower income families *compensates in part* for the larger expenditures necessary to provide them with an adequate educational program so they may overcome their lack of educational background. (At 48; emphasis added.)

Another desirable feature of the Bateman Act was the provision to allow an adjustment in minimum support aid and incentive equalization aid according to changes in the cost of education from year to year and changes in the state-wide average of equalized valuations. N.J.S.A. 18A: 58-6.3. Unfortunately, funding increments of "20%" per year will delay full implementation of the act and may not include money to allow adjustments for inflation. If Bateman had been fully funded in the first year with all districts classified as basic, the total formula aid required would have been approximately $365 million, an increase of approximately $150 million over 1970-71. The Legislature actually increased formula aid by approximately $28 million in the first year. But part of this increase was needed simply for additional pupils coming into the system, and part was also used for the save-harm-

less clause contained in N.J.S.A. 18A:58-18.1.[19] If all districts were classified as comprehensive districts, the estimated annual cost under the Bateman Act would be $650 million, based on September 30, 1970 weighted enrollments. This is an increase over the foundation program of approximtely $430 million.

There is no prefunding under the Bateman Act which would make it easier for a poor district to qualify as a comprehensive district. Many wealthy districts in the state would readily qualify as comprehensive districts under criteria suggested by the Bateman Committee (*Bateman Report,* at 61-63) or that presently being considered. However, the Bateman Committee recognized that some districts "might not be able to attain a higher classification for reasons beyond their control." *Bateman Report,* at 41. The Bateman Committee proposed that the Commissioner should have the authority to change the classification of the district if, "in his judgment, the geography, sparsity of population, inadequacy of property valuations, difficulty of transportation or other factors make it impossible to qualify for a higher level of State aid." *Id.* This recommendation, however, was not adopted by the Legislature. The statute simply provides that criteria to be adopted for classifying districts shall take into consideration "the quality of the educational program of the districts." N.J.S.A. 18A:58-3. Thus, there is little likelihood of poor districts receiving state equalization aid as comprehensive districts. The present funding does not

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[19] The save-harmless clause guarantees that "no school district shall be apportioned for minimum support aid, incentive equalization aid and county vocational school aid an amount less than the per pupil aid, excluding transportation aid and a typical aid, it received for the State fiscal year 1970-71."

remotely approach the monies needed, and poor districts cannot do it on their own. *Camden Survey, supra,* at II-1.

B. The Education Clause

Article VIII, § IV, par. 1 of the 1947 New Jersey Constitution states:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

This clause was first adopted in 1875 as an amendment to the 1844 Constitution. The history of education in New Jersey tells us that this provision was adopted in order to secure as a constitutional right the results of the first 100-year struggle in New Jersey for free and thorough education for all. See Roscoe L. West, *Elementary Education in New Jersey: A History,* at 42-45 (D. Van Nostrand Co., Inc., Princeton, 1964); Robert D. Bole, "A History of State School Support in New Jersey," *The Bateman Report, supra,* at 11.

In his abbreviated history contained in the *Bateman Report,* (at 12) Professor Bole says that the 1851 statute, which gave school districts unlimited taxing power, "set in motion a trend which New Jersey retains to the present day; *i.e.,* school financial support in New Jersey became predominantly a local responsibility." However, this history fails to mention the proportion of state aid in the critical period from 1871 to 1881, during which time the Education Clause was adopted.

Appendix A

In 1871 the Legislature enacted the Free School Law, L. 1871, c. 527. By this law tuition fees which had been charged by some "public" schools in the State were abolished. The 1871 law levied a uniform tax on all real property in the State at two mills per dollar valuation ($0.20 per $100). If this money was not enough to maintain free schools in operation for at least nine months each year, then local districts were required to raise the needed sum by a township tax. State school tax monies were distributed among school districts according to the number of pupils in each district. The law further provided that, except for $20 per year, state money paid to each school district must be used solely for teachers' salaries and fuel (section 10).

In discussing the 1871 law, State Superintendent Apgar said in his Annual Report of 1871 (at 12): "The principal support will come from the State, and if any sum is needed to be voted by the township, it will be small * * *."

The 1871 School Law raised significantly the proportion of school costs borne by the State. In 1870, for example, township and district school taxes ($1.45 million) and tuition ($72,000) constituted 90% of the total statewide expenditures ($1.66 million) and the state appropriation was only $100,000. *N. J. School Report,* 1870, at 11. Thereafter, from 1872 through 1880, state funding averaged 75% of all school costs, exclusive of construction and repairs. Local revenues constituted 23% of current expenses and 40% of all expenditures, inclusive of construction and repair of schools. In fact, during these years many townships and districts raised no school taxes at all. In 1872, for example, 188 of 230 townships and 887 of 1378 districts raised no school tax. *N. J. School Report,* 1872, at 8.

Appendix A

The State continued for many years to pay a large portion of all school costs, although in 1881 it enacted a law ordering 90% of state school taxes returned to the county of origin, leaving only 10% to be distributed by the State Board equitably. L. 1881, c. 106. However, even under the 1881 law, monies returned to the counties were apportioned to all school districts in accordance with pupil census, so that equalization was achieved at least among pupils of each county. As late as 1910, for example, the state share of current expenses was approximately 67% and was almost equal to the total cost of teachers' salaries. *N. J. School Report,* 1910, at xv, xvi. This is not to suggest that the Education Clause adopted by the 1875 amendment requires funding of education costs out of general state revenues. This was the ideal sought by the friends of education, as the history demonstrates. Certainly the re-enactment of the Education Clause as part of the 1947 Constitution was not made with the consensus that public education had to be fully funded by the State out of general revenues. A proposal to include such language in the Education Clause was not adopted. "Recommendations of the New Jersey State Federation of Labor," 5 *Proceedings of the New Jersey Constitutional Convention of* 1947, Appendix, at 893.

[1] The Education Clause was intended to do what it says, that is, to make it a state legislative obligation to provide a thorough education for all pupils wherever located. *Landis* v. *School District No. 44, Camden County,* 57 N. J. L. 509 (Sup. Ct. 1895); *Society for Establishing Useful Manufacturers* v. *Paterson,* 89 N. J. L. 208 (E. & A. 1916), rev'g 88 N. J. L. 123 (Sup. Ct. 1915). This does not preclude local administration and responsibility. *Riccio* v. *Hoboken* 69 N. J. L. 649 (E. & A. 1903), rev'g 69 N. J. L.

104 (Sup. Ct. 1903), held that school districts may be established for the management and support of schools. See also *West Morris Regional Board of Education* v. *Sills,* 58 N. J. 464, 477 (1971). However, the *Riccio* case held that certain classifications in the School Law of 1902 were unconstitutional because they treated some school districts differently according to unimportant characteristics not germane to the purpose of the law. 69 N. J. L., at 661.

[2] Although districts can be created and classified for appropriate legislative purposes, it was held in the *Society for Useful Manufacturers* case, *supra,* that the state school tax remained a state tax even though assessed and levied locally upon local property, with revenues returned by the State to local districts. The court held that prior to the 1875 amendment public schools were a matter of *local* rather than state concern, but that the amendment made the support of public schools a *state* concern. 89 N. J. L., at 211.

In *Landis* v. *School District No. 44, Camden County, supra,* the court dealt with the constitutionality of that provision of the State School Law which permits local districts to raise sums in addition to the state levy. The court held that the State Constitution does not require "the same means of instruction for every child in the state." 57 N. J. L., at 512. The 1875 amendment was said "to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such instructions as is necessary to fit it for the ordinary duties of citizenship; and such provision our school laws would make, if properly executed, with the view of securing the common rights of all, before tendering peculiar advantages to any." The

court further held that the Legislature also had power to provide "beyond this constitutional obligation * * * in its discretion, for the further instruction of youth in such branches of learning as, though not essential, are yet conducive to the public service. On this power, I think, rest the laws under which special opportunities for education at public expense are enjoyed."

[3] The word "thorough" in the Education Clause connotes in common meaning the concept of completeness and attention to detail. It means more than simply adequate or minimal. Not adopted was a lower standard of education which had been proposed:

> Public school shall be established and maintained for the gratuitous instruction of all persons in the State between the ages of five and eighteen years, such schools to give rudimentary instruction, and not to fit or prepare scholars for college, or to be controlled by or under the influence of any creed, religious society or denomination whatever. [*New York Times,* November 24, 1873, at 2:4.]

It is clear from findings made earlier that a "thorough" education is not being afforded to all pupils in New Jersey. However, the Bateman Act would probably afford sufficient financing for a thorough education if that act were fully funded. In an area as difficult and costly as education, the judiciary would not invalidate a statute simply because all the funds necessary to fulfill its objectives were not made available in the first year or two of operation. As the Supreme Court said in the *West Morris Regional Board* case *supra,* 58 N. J., at 481, where public monies are involved, "modest objectives must be allowed even though more pervasive ones would be wel-

come." A statute may not be invalidated "merely because it would also be reasonable to do more." This is not to say that a statute will be left intact without a reasonable expectation that the fundamental constitutional demand for a thorough education will be achieved in the near future. A court would consider at least taking such steps as are necessary to allocate available resources in order to more closely approximate the constitutional demand. As a first step, certainly, the provision affording minimum support aid to each district regardless of wealth and the same harmless provision of the Bateman Act should yield to the state constitutional purpose.

The Bateman Committee sought to justify minimum aid on the ground that it would provide even wealthy districts with the incentive to improve educational programs, and to maintain them at high levels. *Bateman Report,* at 48-49. The justification offered at trial was that the State "should do something for every district." However, as long as some districts are receiving inadequate education, below that constitutionally required, the reasons offered cannot constitute a valid legislative purpose. As long as some school districts are underfinanced I can see no legitimate legislative purpose in giving rich districts "state aid." I am satisfied by the evidence that a strong reason for minimum aid and save harmless aid is political, that is, a "give up" to pass the legislation.

[4-6] I conclude, therefore, that the Bateman Act as presently funded does not meet the state constitutional standard of a thorough education for all. Fully funded, however, with funds to offset inflationary trends, the Bateman Act would probably reach this goal, even in cities with a high AFDC composition. It might also reach the constitutional goal in poorer non-AFDC districts, al-

though they will remain at a disadvantage in competing with wealthy suburbs and AFDC cities in dollars available for good teachers. Accordingly, the Bateman Act will not be invalidated on the ground that at present funding levels it does not provide a thorough education for all. However, the minimum support aid and save harmless provisions cannot be reconciled at this time with the command of the Education Clause.

V. Equal Protection of the Laws

> * * * all men are created equal * * *
>
> —*Declaration of Independence,* 1776.

> Each child in the State has the right to an educational program geared to the highest level he is capable of achieving, permitting him to realize his highest potential as a productive member of society.
>
> —*The Bateman Report,* at 38.

Art. I, par. 1 of the New Jersey Constitution of 1947 provides as follows:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Our Supreme Court has held that this clause contains an implied guarantee of equality comparable to the Equal Protection Clause of the Fourteenth Amendment. *Washington National Ins. Co.* v. *Board of Review,* 1 N. J. 545,

554 (1949); see *Bailey* v. *Engelman*, 56 N. J. 54, 55 (1970). Where educational objectives are left primarily to the states, it may be preferable for New Jersey to develop its own rules of equality though they may be more stringent than federal standards. See *Booker* v. *Board of Education, Plainfield*, 45 N. J. 161 (1965), dealing with a mandate of the State Commissioner of Education to alleviate *de facto* segregation in public schools; see also, *Jenkins* v. *Morris Township School District*, 58 N. J. 483 (1971).

Inequalities and inadequacies exist under our financing system. Inequalities are inherent in a system where the capacity to raise taxes for school purposes differs according to the wealth of districts.

It is argued that the system is justified by the State's desire to afford local control over education. To what extent local control is real or mythical has been debated in this case. The Bateman Act provides that the Commissioner "shall review each item of appropriation within the budget" of a district whose local tax requirement is less than state formula aid. N.J.S.A. 18A:58-5. There is evidence to indicate that as much as 90% of some current budgets are composed of costs that are more or less fixed or recurring. These include teachers' salaries (which are the largest portion of the budget), pension costs, insurance and debt service costs. See N.J.S.A. 18A:29-4.1 which requires implementation of teacher salary policies and schedules. Most authorities agree that local control, in the sense of hiring teachers, establishing programs, and allocating available resources, is desirable. Beyond common essentials, educational goals should be adjusted to community needs. Also, raising local revenues for school costs may tend toward more efficient use of funds. How-

ever, while these purposes may be pursued by appropriate means, local control and responsibility cannot be used to justify a system that breeds substantial disparities in the quality of education. The shortage of funds in some districts actually minimizes local discretion in programming and in the ability to compete for the services of good teachers. School boards in poor districts cannot opt to institute special services when their budgets do not include adequate funds even for essentials. In this sense local control is illusory. It is control for the wealthy, not for the poor.

In theory the Bateman Act goes far toward equalizing the revenue-raising power of local districts. Even for those districts with a large number of AFDC children, however, the Bateman Act equalizes only to a given level. Poor, non-AFDC basic districts in rural areas and suburbs will not be raised even to the state average of equalized valuations. One reason for this is that the $30,000 guaranteed valuation level chosen by the Bateman Committee was based upon the 1965-66 per pupil state median valuation, which was then $32,057. *Bateman Report*, at 50. The Bateman Act was not adopted until 1970. It became effective July 1971. By this time the statewide average equalized valuation was more than $41,000 per pupil. See Appendix A. Table I, above, shows that there are 208 districts in the State with a total enrollment of 620,000 (approximately 40% of total state enrollment) whose valuations are less than $35,000 per pupil. Excluding the AFDC weighting factor, the remaining districts in the State, with an enrollment of 865,000, can raise school funds as basic districts at lower tax rates than the first group, even after the equalization formula is given effect. Although the AFDC factor will tend to assist those districts

with high AFDC populations, the added costs in educating pupils of those districts should offset the gain in state aid. Moreover, there is no assurance that local officials, particularly in type I districts, will use the added aid for improved education by increasing budgets appreciably; they may simply use the aid to help keep tax rates down. Camden, for example, receives state aid of $345 per pupil, plus substantial federal aid (note 13, *supra*), and still has a current expense budget of only $843 per pupil. The Bateman Act itself reduces incentive equalization aid in proportion to the amount of federal aid received by a district. See definition of "net operating budget." N.J.S.A. 18A:58-2.

The large group of pupils in small, poor districts, in rural areas and elsewhere, with little AFDC population, are likely to derive the least benefit from the Bateman formula, as Table V shows. These "poor" districts with valuations of $30,000 or less per pupil must tax at 3.12% in order to spend $1,200 per pupil as a basic district, under Bateman fully funded. Spending $1,200 per pupil, a basic district with equalized valuation per pupil of $30,000 must raise $936 by local taxes in order to receive $121 in minimum aid (weighted) and $93 in state equalization aid. By comparison, districts with $60,000 in equalized valuations, spending the same amount, have a tax rate of 1.71% and will still receive $121 in minimum support aid.

Even if districts were better equalized by guaranteed valuations, the guarantees do not take into consideration "municipal and county overload." This was a problem which the Bateman Committee recommended to the Permanent Commission for further study. *Bateman Report,*

at 9. Poor districts have other competing needs for local revenue. The evidence shows that poorer districts spend a smaller proportion of their total revenues for school purposes. The demand for municipal services tends to diminish further the school revenue-raising power of poor districts. Another general disadvantage of poor districts is the fact that property taxes are regressive; they impose burdens in inverse proportion to ability to pay. This is because poor people spend a larger proportion of their income for housing. See *N. J. Model Cities Report,* at 38-40; *Guthrie et al., Schools and Inequality, supra,* at 186-188.

This is not to suggest that the same amount of money must be spent on each pupil in the State. The differing needs of pupils would suggest the contrary. In fact, the evidence indicates that pupils of low socio-economic status need compensatory education to offset the natural disadvantages of their environment. This is consistent with some comments in the *West Morris Regional Board* case, *supra,* 58 N. J. at 477, 478. While that opinion states in dictum that the Equal Protection Clause of the Fourteenth Amendment does not require identical expenditures for all students, and states (at 478) that benefits "may indeed depend upon the district of a student's residence," the court clearly stated that it did not "anticipate the question whether the State statutory scheme may, because of local failures, become unequal to the constitutional promise and command." *Ibid.,* n. 7.

[7, 8] Providing free education for all is a state function. It must be accorded to all on equal terms. *Brown* v. *Board of Education,* 347 U. S. 483, 493 74 S. Ct. 686, 98 L. Ed. 873 (1954). Public education cannot be financed by a method that makes a pupil's education depend upon the

wealth of his family and neighbors as distinguished from the wealth of all taxpayers of the same class throughout the state. *Serrano, Van Dusartz* and *Rodriguez* cases, *supra,* n. 1.

Arthur Wise, Associate Dean, The Graduate School of Education, University of Chicago, first advanced this thesis in "Is Denial of Equal Educational Opportunity Constitutional?" 13 *Administrator's Notebook,* No. 6 (University of Chicago, Feb. 1965). He elaborated upon it in *Rich Schools, Poor Schools* (Univ. of Chicago Press Chicago, 1968). It was his contention that the present system of funding education of all states except Hawaii (which is funded entirely out of general state revenues) denies the equal protection of the laws. A similar thesis has been advanced by Coons, Clune and Sugarman, in "Educational Opportunity: A Workable Constitutional Test for State Financial Structures," 57 *Cal. L. Rev.* 305 (1969), and in *Private Wealth and Public Education* (The Belknap Press of Harvard University Press, Cambridge, 1970). It is this thesis that has been adopted by the California Supreme Court in *Serrano, supra,* and by the federal courts in *Van Dusartz* and *Rodriguez, supra.*

[9, 10] The New Jersey system of financing public education denies equal protection rights guaranteed by the New Jersey and Federal Constitutions. In support of this conclusion I adopt the thesis of the foregoing authorities. Education is one of the most important functions of state governments, and educational opportunities, where the state has undertaken to provide them, is a right that must be made available to all on equal terms. *Brown* v. *Board of Education, supra.* Education is a fundamental interest, vital to the future of every citizen

(see *Brown, supra; Booker, supra,* where our Supreme Court said that "it is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs," 45 N. J. at 170-171). Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. *Harper* v. *Virginia Bd. of Election,* 383 U. S. 663, 668, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966); *Griffin* v. *Illinois,* 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956). Thus, where fundamental rights are asserted under the Equal Protection Clause, classifications will be closely scrutinized. *Reynolds* v. *Sims,* 377 U. S. 533, 561-562, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Harper* case *supra,* 383 U. S. at 670, 86 S. Ct. 1079.[20]

No compelling state interest justifies New Jersey's present financing system. It is doubtful that this system even meets the less stringent "rational basis" test normally applied to the regulation of state fiscal or economic matters. See *McGowan* v. *Maryland,* 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); *Williamson* v. *Lee Optical of Oklahoma,* 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955). While local control is desirable, discriminations should not be tolerated if they are not necessary for achieving the stated purpose. See *Riccio* case *supra.* A finance system can be devised for New Jersey which affords equal protection to all pupils without precluding local control over public education. The invidious disparities cannot be justified by any overriding state

[20] See also, in general, Note "Development in the Law—Equal Protection," 82 *Harv. L. Rev.* 1065 (1969), and Michaelman, "On Protecting the Poor Through the Fourteenth Amendment," 83 *Harv. L. Rev.* 7 (1969).

purpose. Distribution of school resources according to the chance location of pupils cannot be tolerated under the State or Federal Constitutions.

The Attorney General contends that two earlier federal cases foreclose consideration of the Fourteenth Amendment equal protection claim: *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N. D. Ill. 1968), aff'd mem. *sub nom. McInnis* v. *Oglivie*, 394 U. S. 322, 89 S. Ct. 1197, 22 L. Ed. 2d 308 (1969); *Burruss* v. *Wilkerson*, 310 F. Supp. 572 (W. D. Va. 1969), aq'd mem. 397 U. S. 44, 90 S. Ct. 812, 25 L. Ed. 2d 37 (1970). This contention was rejected by the courts in *Serrano*, *Van Dusartz* and *Rodriguez supra*, on the grounds that *McInnis* and *Burruss* were limited to the assertion of a "needs" test for the distribution of school funds. (The "needs" test was rejected by our own Supreme Court in relation to the distribution of AFDC funds. *Bailey* v. *Engleman*, *supra*, n. 5). The complaints in *McInnis* (see Coons et al., *Private Wealth and Public Education*, *supra*, at 306) and in *Burruss* appear broad enough to include the claims made here and in *Serrano*. Nevertheless, the conclusion that the issue is still open despite the summary affirmances in *McInnis* and *Burruss* is confirmed by the more recent action of the United States Supreme Court in *Askew* v. *Hargrave*, 401 U. S. 476, 91 S. Ct. 856, 28 L. Ed. 2d 196 (1971).

[11] The equal protection concepts applied here derive from cases that seem to lend themselves more readily to judicial control. See *Reynolds* v. *Sims*, *supra*, asserting the standard of one-man, one-vote; *Griffin* v. *Illinois*, *supra*, holding that an indigent defendant is entitled to a free transcript on appeal; the *Harper* case, *supra*, holding that a $1.50 poll tax is an unconstitutional restraint on

the right to vote. But one facet of the case at hand does invite a simple standard. Since the State Constitution requires the State Legislature to provide a thorough education for all pupils age 5 to 18, a tax levied to raise revenues for that specific state purpose should be applied uniformly to all members of the same class of taxpayers. Under the present system taxpayers in different districts pay different tax rates for school purposes. To the extent that these revenues fulfill the State's constitutional obligation to provide a "thorough" education, the purpose remains a common state purpose, not a local purpose. (It is noted that there is no comparable provision in our Constitution dealing with municipal services such as police, fire, sanitation, etc.) Accordingly, the "equality" provisions of the State and Federal Constitutions preclude taxing the same class of people at different rates. See *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620, 623, 66 S. Ct. 445, 90 L. Ed. 358 (1945); *Baldwin Construction Co.* v. *Essex County Board of Taxation*, 16 N. J. 329 (1954); *In re Appeals of Kents* case, *supra*, 34 N. J. at 28, 29; *Passaic* v. *Passaic County Board of Taxation*, 18 N. J. 371, 381 (1955).

Uniformity in taxation is required by N. J. Const., Art. VIII, § I, par. 1(a), which is as follows:

> Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.

Appendix A

No opinion is expressed here on the relationship of the second sentence of paragraph (a), above, to a statewide tax on real property at a uniform rate for distribution to school districts. This was not an issue in the case. It is clear that some kind of uniform, statewide tax can be adopted by the State to finance "thorough" education without relying on a real property tax. In 1935 the Legislature adopted a sales tax to support school finance reform, but it was repealed within four months. See *Bateman Report* at 18.

One hundred years ago, after a long struggle, the State adopted the 1871 Free School Law and made the right to a thorough public education a constitutional right. The proposition that the education of a child should be substantially supported by all the citizens of the State prevailed for a time over dissenting voices. The arguments in opposition were answered by State Superintendent Ellis Apgar. He reasoned that the "general diffusion of intelligence is for the general good" of the State, and that equity demands that the expense be paid "by a uniform rate of taxation" on the people as a whole. To those who argued that schools should be supported by a county tax only he replied: the county is simply a subdivision of part of the whole political organization which is the State, and to support schools with county taxes would discriminate in favor of wealthy counties over those that are poor. He noted that some people favored a township tax to support only the schools of their own township and that, even if this were adopted, it would fail to please wealthy taxpayers from whom the objections come. He concluded by saying that if the question "of giving and receiving" is discussed further between two neighbors, one "blessed with children only, and the other with property

only" the logic of the argument would compel but one conclusion: "our Public School system must be abolished and every man must educate his own children." *N. J. School Report,* 1878, at 23, 24.

There is no compelling justification for making a taxpayer in one district pay a tax at a higher rate than a taxpayer in another district, so long as the revenue serves the common state educational purpose.[21] Moreover, education is too important to the State as well as the children of the State to be largely controlled by the haphazard distribution of real property wealth. The State and its courts have a special solicitude for the welfare of children since they have little control over their own destinies. Children may become wards of the court simply to insure that they be provided with "proper protection, maintenance and education." N.J.S.A. 9:2-9; N.J.S.A. 2A:4-2; see *State* v. *Perricone,* 37 N. J. 463, 476 (1962). Education is not left to the discretion of a parent. By statute every parent is compelled to have his child between 6 and 16 attend schools. The public school that he attends is entirely the creation of state laws. As was said in *Van Dusartz, supra,*

> What is important to note is that the objection to classification by wealth is in this case aggravated by the fact that the variations in wealth are State created. This is not the simple instance in which a

[21] If monies are supplied to local districts from general state revenues sufficient for a "thorough" education, some districts may still desire to add to that sum by local property taxes. This may reintroduce inequities of various sorts; however, the issue was not argued, and my decision is not intended to reflect unpon it. See *Landis* case, *supra.*

poor man is injured by his lack of funds. Here the poverty is that of a governmental unit that the State itself has defined and commissioned.

Education serves too important a function to leave it also to the mood—in some cases the low aspirations—of the taxpayers of a given district, even those whose children attend schools in the district. The uncertainty of raising sufficient local funds for school purposes is the very hazard that the uniform state tax was designed to meet under the Free School Law of 1871. As State Superintendent Apgar stated then, "By this change our school system is, for the first time in its history, placed upon a sure and substantial basis. Our schools will not longer depend for their support upon a fund which a mere majority at a town meeting may any year withhold." The Education Clause and the equality provisions of the New Jersey Constitution require a more certain and uniform basis than our statutory scheme now provides for the thorough education of each child.

For the foregoing reasons I hold that the statutes of New Jersey do not provide the equality of educational opportunity which is demanded by our State Constitution. In my opinion the statutory scheme also violates the Equal Protection Clause of the Fourteenth Amendment.

VI. Conclusion

The present system of financing public elementary and secondary schools in New Jersey violates the requirements for equality contained in the State and Federal Constitutions. The system discriminates against pupils in districts with low real property wealth, and it discrim-

inates against taxpayers by imposing unequal burdens for a common state purpose. The State must finance a "thorough and efficient" system of education out of state revenues raised by levies imposed uniformly on taxpayers of the same class. The present equalizing factors in the law are not sufficient to overcome inequities in the distribution of school funds and tax burdens.

The present financing system is declared unconstitutional; but this declaration shall operate prospectively only and shall not prevent the continued operation of the school system and existing tax laws and all actions taken thereunder. This declaration shall not invalidate past or future obligations (such as school bonds, anticipation notes, etc.) incurred under the provisions of existing school laws and tax laws. Said laws shall continue in effect unless and until specific operations under them are enjoined by the court. See *Switz* v. *Middletown Tp., supra,* 23 N. J. at 598-599; *Ridgefield Park* v. *Bergen County Board of Taxation,* 33 N. J. 262, 266 (1960). To allow time for legislative action, such operations shall not be enjoined prior to January 1, 1974, except that if a nondiscriminatory system of taxation is not enacted by January 1, 1973, then from and after that date no state monies shall be distributed to any school districts pursuant to the "minimum support aid" provisions and the save-harmless provisions of the Bateman Act. (L. 1970, c. 234) which have been identified previously in this opinion. All funds that are thereby set free shall be distributed by appropriate state officials in a manner that will effectuate as far as possible the principles expressed herein; more specifically, these funds shall be applied to raise guaranteed valuations to the highest level that a proportionate distribution funds will permit, utilizing the remaining provisions of the Bateman Act.

The court will retain jurisdiction for such modification or further order as may be required. See *Switz* v. *Middletown Tp., supra,* 23 N. J. at 598-599, 614.

Nothing herein shall be construed as requiring the Legislature to adopt a specific system of financing or taxation. The Legislature may approach the goal required by the Education Clause by any methods reasonably calculated to accomplish that purpose consistent with the equal protection requirements of law.

While equalizing tax burdens may be readily accomplished by known means, it may be more difficult to assure that additional school funds will actually result in improved education. No purpose would be served by simply bidding up the cost of the same services without the expectation of improvement. Education must be raised to a "thorough" level in all districts where deficiencies exist. The Legislature, the State Board, the Bateman Committee, educators in this State have defined this goal in commendable terms. See Part I, above. The State Board and the Commissioner have ample statutory power to measure progress and to enforce this mandate by rule and regulation. Equalizing the tax burden in support of these purposes is a more certain goal. The New Jersey Constitution demands that both goals be attained.

An appropriate order for judgment shall be submitted. It shall include specific provisions to assure the validity and enforceabality of past and future acts and obligations incurred under existing laws as long as they remain operative.

APPENDIX B

Supplemental Opinion of the Superior Court of New Jersey, Law Division (119 N.J. Super. 40)

KENNETH ROBINSON, ETC., ET AL., PLAINTIFFS, v. WILLIAM T. CAHILL, ETC., ET AL, DEFENDANTS.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

Decided March 30, 1972.

SYNOPSIS

Action challenging constitutionality of system of financing public schools. The Superior Court, 118 N. J. Super. 223, in an opinion, which was handed down on January 19, 1972, indicated that system whereby 67% of costs were supplied by local taxes constituted denial of equal protection and determined that if nondiscriminatory system of taxation were not enacted by January 1, 1973, no state monies could be distributed to any school district pursuant to "minimum support aid" and save harmless provisions of Bateman Act. In a supplemental opinion, the Superior Court, Botter, J. S. C., held that January 1, 1973 operative date would not be postponed, in light of fact that it would not be legally impossible for school districts to obtain sufficient funds following January 1, 1973 if state minimum aid and save harmless aid were withdrawn.

Judgment previously entered to stand.

Appendix B

1. Schools and school districts

With regard to opinion, which was handed down on January 19, 1972, which indicated that system of financing public education whereby 67% of costs were supplied by local taxes constituted denial of equal protection and in which it was determined that if nondiscriminatory system of taxation were not enacted by January 1, 1973, no state monies could be distributed to any school district pursuant to "minimum support aid" and save harmless provisions of Bateman Act, January 1, 1973 operative date would not be postponed, in light of fact that it would not be legally impossible for school districts to obtain sufficient funds following January 1, 1973 if state minimum aid and save harmless aid were withdrawn. N.J.S.A. 18A:22-8, 14, 21(3), 22, 23, 32, 33, 40, 41, 42, 43, 18A:36-1, 40A:1-1, 40A:4-11, 12, 13, 14, et seq., 64, 54:4-66, subds. a, c, 76.

2. Constitutional law

Concepts of equality comparable to rights of equal protection under Fourteenth Amendment are derived from number of provisions of State Constitution. U.S.C.A. Const. Amend. 4; Const. 1947, Art. I, par. 1, Art. IV, § VII, pars. 7-9.

3. Schools and school districts

Taxation

Legislature cannot enact system of education or taxation that prefers one individual or group of individuals over another without reasonable basis for distinction between them which is related to purposes to be served.

Appendix B

Mr. Harold J. Ruvoldt, Jr., for plaintiffs (*Messrs. Ruvoldt and Ruvoldt,* attorneys).

Mr. Stephen G. Weiss, special counsel, for defendants (*Mr. George F. Kugler, Jr.,* Attorney General of New Jersey, attorney).

Botter, J. S. C. Following the filing of my opinion in this case on January 19, 1972, and reported in 118 N. J. Super. 223, counsel for defendants asked leave to be heard on the form of judgment to be entered and specifically moved (by letter of February 2, 1972, and orally on February 4, 1972) to postpone certain operative dates fixed by the court in that opinion, namely, the January 1, 1973 date and the January 1, 1974 date. The date suggested by the Attorney General for legislative action was two years from the conclusion of an appeal to the New Jersey Supreme Court, or, in any case, not earlier than January 1, 1974. In my written opinion I had provided that all operations under existing school laws and tax laws shall continue. I further provided:

> To allow time for legislative action, such operations shall not be enjoined prior to January 1, 1974, except that if a nondiscriminatory system of taxation is not enacted by January 1, 1973, then from and after that date no state monies shall be distributed to any school districts pursuant to the 'minimum support aid' provisions and the save harmless provisions of the Bateman Act (L. 1970, c. 234) which have been identified previously in this opinion. All funds that are thereby set free shall be distributed by appropriate state officials in a manner that will effectuate as far as possible the principles expressed herein; more specifically,

> these funds shall be applied to raise guaranteed valuations to the highest level that a proportionate distribution of funds will permit, utilizing the remaining provisions of the Bateman Act. [118 N. J. Super. at 280-281]

On the motion to settle the form of judgment I denied the motion of the Attorney General for a change in these dates. However, in the judgment entered I added to the portion of the opinion quoted above the following:

> Provided, however, that no such distribution of minimum aid and save harmless funds shall be made without further order of this court, and, in any event, the Commissioner of the State Department of Education, State of New Jersey, on or before November 15, 1972, shall formulate and submit to this court for approval a plan for the effectuation of this provision prior to putting it into effect; and provided, further, that the State Board of Education and/or the Commissioner of the Department of Education, State of New Jersey, may propose an alternate plan or plans for the use or distribution of said minimum support aid and save harmless funds to effectuate the principles expressed in the written opinion of this court in the event this injunction shall become operative, said plan or plans to be submitted on or before November 15, 1972.

At oral argument the Attorney General contended that the January 1, 1973 date for the possible cut-off of minimum aid to certain school districts presented practical difficulties. He did not contend that any school district

would be legally unable to obtain funds to replace the minimum aid loss that may occur. I denied the motion, with leave to the Attorney General to file a brief or letter memorandum specifically indicating whether it was his position that the statutory scheme would make it legally impossible for some school districts to obtain sufficient funds through usual budget appropriations and procedures to make up for the loss, if any, of minimum aid revenues from the State.

By letter of February 17, 1972 I again requested that the Attorney General advise me of his position on this point. I received a reply on or about March 2, and thereupon advised counsel that I intended to write a supplemental opinion on the subject and requested plaintiffs' attorney Ruvoldt to expedite his reply. He presented his position by letter of March 20.

[1] I interpret the Attorney General's position to be that the withholding of certain state aid would leave a municipality with inadequate revenues raised by normal tax procedures between January 1 and June 30, 1973, and that this deficit would not be made up by taxes collected until the latter half of 1973. Nevertheless, any municipality whose expenses for the first half of any calendar year exceed tax revenues received during that period may borrow the additional money needed in anticipation of taxes to be received in the second half of the calendar year. This problem, when it exists, is not unique. It may occur because of increases in municipal and county expenses, as well as other reasons, such as the loss of anticipated federal aid or unusual reductions in ratables or in tax collections for a given period.

Under *Title* 40A, which includes the Local Budget Law (Chapter 4), the fiscal year is defined as "the calendar

year beginning on January 1 and ending on December 31." N.J.S.A. 40A:1-1. Municipalities adopt budgets for a calendar year and these budgets are transmitted to the county board of taxation no later than March 31 of each year. N.J.S.A. 40A:4-11.

N.J.S.A. 40A:4-12 provides as follows:

> The amount to be raised by taxation, as stated in the county budget, shall be the amount to be raised by taxation for county purposes. The amount to be raised by taxation, as stated in the municipal budget, shall be the amount to be raised by taxation for municipal purposes and for school purposes where school district costs are required to be included in the municipal budget. These taxes shall be assessed, levied and collected within the respective taxing districts in the manner prescribed by law.

N.J.S.A. 40A:4-13 provides as follows:

> The amount to be raised by taxes for school purposes, required to be certified to the governing body of a municipality for inclusion in its budget, shall be set forth in a separate section of the budget upon adoption and shall be added to the amount to be raised by taxes for school purposes, if any, which were included in the approved budget upon the final adoption of the budget, or it may be omitted from the budget as approved and may be added to the budget, by resolution, on final adoption without public advertisement.

Appendix B

N.J.S.A. 40A:4-14 provides as follows:

> In making the certifications of the budget for transmission to the county board, the amount to be raised by taxes for school purposes by a municipality shall be separately stated and
>
> a. In municipalities in which the amount to be raised by taxes for school purposes is required to be certified to the governing body for inclusion in its budget, there shall be deducted from the 'municipal tax levy'
>
> 1. The amount appropriated for debt service after first deducting therefrom the amount of the State school building aid, if any, and
>
> 2. the amount of any emergency appropriation for school purposes certified to the municipality and approved by the governing body thereof;
>
> 3. the amount appropriated for school capital improvements for land, buildings and equipment.
>
> b. In all other municipalities, there shall be deducted from the municipal tax levy any appropriations for school purposes required.
>
> Said items shall be added by the county board to the amounts to be raised by taxation for school purposes.

Following receipt of the municipal budgets, the county board of taxation, on or before April 10, completes a table of aggregates which includes, among other items, total ratables, the amount of county, municipal and dis-

trict school taxes, and the tax rate for local taxing purposes. N.J.S.A. 54:4-52.

N.J.S.A. 18A:36-1 provides:

> The school year for all schools in the public school system shall begin on July 1 and end on June 30.

Under N.J.S.A. 18A:22-14 the board of school estimate in a Type I school district must fix the school budget no later than February 15 of each year for the ensuing school year. That budget includes current expenses, anticipated revenues, the amount available from a surplus account and the amount of state aid anticipated. N.J.S.A. 18A:2-28. The board of school estimate determines the amount of money to be appropriated for public schools "for the ensuing school year, exclusive of the amount which shall have been apportioned to it by the (state) commissioner * * *." N.J.S.A. 18A:22-14. In a Type II school district, without a board of estimate, a school budget is adopted by the board of education no later than February 1. N.J.S.A. 18A:22-32. By submission of the budget to the electorate the voters determine the amounts to be raised "by special district tax for said purposes" and this sum, together with interest and debt redemption charges, is certified to the county board of taxation on or before April 1, and such amounts "shall be included in the taxes assessed, levied and collected in the municipality or municipalities comprising the district for such purposes." N.J.S.A. 18A:22-33.

The written opinion of the court in this case, which received widespread notice throughout the State, was handed down January 19, 1972. I assume, however, that

school budgets adopted and submitted by April 1, 1972 did not anticipate the possibility of some districts losing minimum state aid or "save harmless" aid. Nevertheless, the amounts to be raised by local taxes in the 1973 calendar year for school purposes will be known on or about January 1, 1973. By then we will know whether the Legislature has acted or not. Certain districts will then know if they will not receive minimum aid or "save harmless" aid that they had anticipated receiving for the period January 1, 1973 to June 30, 1973.

In both Type I and Type II school districts the amounts certified to the county board of taxation to be raised by local taxes for school purposes excludes anticipated state aid. Accordingly, if state aid is withheld from some districts, the amount of revenues to be raised by local taxes during the first half of 1973 will be insufficient in those districts to pay all school costs in budgets adopted early this year unless the amounts certified to the county board of taxation are increased. Counsel for the parties agree that in a Type I school district an additional appropriation of funds can be voted by resolution of the board of education in case of an emergency arising since adoption of the budget. N.J.S.A. 18A:22-21(3). When certified by the board of school estimate, funds must be appropriated by the municipal government body. N.J.S.A. 18A: 22-22 and 23. See *Newark Teachers Ass'n* v. *Board of Education, Newark,* 108 N. J. Super. 34, 46-48 (Law Div. 1969), aff'd 57 N. J. 100 (1970). Actually, what is involved is not an increase in the total budget for school purposes, but rather the need to increase the amount certified to the county board of taxation to be raised by local taxes. The same applies to a Type II district. There, although the total budget for 1972-73 has been voted upon

and approved by the electorate, it is fair to construe N.J.S.A. 18A:22-23 to say that the public has voted primarily to determine the amount of money to be raised by local taxes, In a Type II district, under N.J.S.A. 18A:22-40 and 41, to raise "additional sums of money, over and above the amount fixed and determined in the last annual school budget, by special district taxes," the board of education must determine the amount needed and that amount must be submitted to the voters at a special school election. If approved, a local board of education is authorized to borrow money for these purposes and to issue promissory notes maturing not later than December 31 of the year in which taxes are to be raised for the additional sums required. N.J.S.A. 18A:22-42. This procedure must be completed before April 1 so that the additional amounts certified to the board of taxation may be raised by taxes in that year. N.J.S.A. 18A:22-43.

Municipal taxes are payable on February 1, May 1, August 1 and November 1. N.J.S.A. 54:4-66(a). The first two installments of taxes are each one-fourth of the total tax levied against the same property in the preceding year, and the last two installments constitute the full tax for the current year minus the first two installments. N.J.S.A. 54:4-66(c). A municipality must pay local school taxes when due and must borrow sufficient money, if necessary, to pay such taxes. N.J.S.A. 54:4-76. N.J.S.A. 40A:4-64 authorizes a municipality to borrow money and issue notes in anticipation of the collection of taxes for that year. See also N.J.S.A. 40A:4-46 *et seq.*, dealing with emergency appropriations and borrowing.

Although the total school budgets for July 1, 1972 to June 30, 1973 have been approved by public bodies and by the electorate (in Type II districts), I agree with the

contention of the Attorney General that additional local revenues required because of a loss of state aid would have to be made up by added appropriations under the procedures mentioned above. This procedure would allow a board of school estimate where one exists, and the public (in a Type II district), to reconsider the total budget in the light of reduced state aid. The amount of minimum aid that may be lost in some districts for the period January 1 to June 30, 1973 is approximately $54 per pupil. Some districts may be able to raise the additional funds without borrowing. In some cases expenditures may be deferred administratively to a later time in the year when additional tax money comes in; and an increase in ratables in some wealthy suburban areas may produce additional revenues even in the first half of the tax year.

In any case, the Attorney General apparently concedes that it will not belegally impossible for a school district to obtain oufficient funds when needed to operate schools following Janary 1, 1973 even if state minimum aid and save-harmless aid is withdrawn from certain districts. Reviewing the budget by a board of school estimate, holding a special election in a Type II district, and borrowing money, where necessary, may be unwanted and inconvenient procedures. However undesirable this may be it need not come to pass if the Legislature acts in time. Moreover, the inconvenience and expense is small compared to the unfairness of giving substantial sums of school aid to wealthy districts with relatively low taxes while poorer districts in the state have inadequate school funds and high taxes. Accordingly, my previous decision, rendered orally, denying the Attorney General's motion for a change in dates is ratified.

[2] Another point raised by the Attorney General on the motion to settle the form of judgment is the need to specify the specific provision of our State Constitution in which equal protection right are afforded. In *Robinson* v. *Cahill,* 118 N. J. Super. 223, 270-271 (Law Div. 1972) *Washington National Ins. Co.* v. *Board of Review,* 1 N. J. 545, 553-554 (1949), was cited for the proposition that the right to equal protection resides in Art. I, par. 1 of our State Constitution. This view would appear to have been cited with approval in *Bailey* v. *Engelman,* 56 N. J. 54, 55 (1970). While the phrase "equal protection of the laws" is not used in the New Jersey Constitution, concepts of equality comparable to the rights of equal protection under the Fourteenth Amendment are derived from a number of provisions of our State Constitution. In *General Public Loan Corp.* v. *Director, Div. of Taxation,* 13 N. J. 393, 401 (1953), reference is made to Art. I, par. 1 and Art IV, § 7, pars. 7, 8 and 9, as the "group of constitutional provisions * * * adverted to as the 'equal protection' clauses." See also *Robson* v. *Rodriguez,* 26 N. J. 517, 526 (1958), where the court said that the "test of whether a law constitutes special legislation is essentially the same as that which determines whether it affords equal protection of the laws." See also *Alfred Vail Mutual Ass'n* v. *Borough of Shrewsbury,* 58 N. J. 40, 52 (1971), where the court, in dealing with the reasonableness of classifications for legislative purposes, emphasized the requirement that the Legislature act "by general laws" contain in the concluding paragraph of Art. IV, § 7, par. 9.

Although my January 19 opinion dealt with equal protection rights, the concept that legislation must not be arbitrary and cannot contain unreasonable classifications,

unnecessary or unrelated to appropriate legislative purposes, may also be expressed in terms of due process rights. See *Adler's Quality Baker, Inc.* v. *Gaseteria, Inc.*, 32 N. J. 55, 70 (1960); *Reingold* v. *Harper*, 6 N. J. 182, 190-194 (1951).

[3] My purpose here is simply to indicate that equal protection rights and the requirement for reasonable classifications germane to a legislative purpose are rights that are derived not only from Art. I, par. 1, but are common to other provisions of our State Constitution. It may be said that these rights find expression in our State Contitution so pervasive that they constitute the most fundamental and essential guaranty of that Contitution. This means that the legislature cannot enact a system of education or taxation that prefers one individual or group of individuals over another without a reasonable basis for a distinction between them which is related to the purposes to be served. The right of each citizen of this State to a quality education cannot be inhibited by a legislative scheme that prefers some pupils over others and some taxpayers over others.

With these additional observations, the judgment entered by me on February 4, 1972 shall stand.

APPENDIX C

Opinion of the Supreme Court of New Jersey, (62 N.J. 473)

KENNETH ROBINSON, AN INFANT, BY HIS PARENT AND GUARDIAN AD LITEM, ERNESTINE ROBINSON, ET AL., PLAINTIFFS-RESPONDENTS, v. WILLIAM T. CAHILL, GOVERNOR OF THE STATE OF NEW JERSEY, ET AL., DEFENDANTS-APPELLANTS.

Argued January 9, 1973—Decided April 3, 1973.

SYNOPSIS

Action was brought by residents, taxpayers and various municipal officials challenging constitutionality of system of financing public schools of New Jersey. The Superior Court, Law Division, Botter, J. S. C., 118 N. J. Super. 223, supplemented at 119 N. J. Super. 40, entered judgment which declared the system of financing public schools to be unconstitutional. The defendants appealed. The Supreme Court, Weintraub, C. J., held that New Jersey system of financing public education which relies heavily on local taxation to furnish approximately 67% of public school costs, which leads to great disparity in dollar input per pupil and which has no apparent relation to mandate for equal educational opportunity is violative of the constitutional provision which imposes upon the State the obligation to furnish thorough and efficient system of public schooling.

Judgment modified, and as modified, affirmed.

Appendix C

1. Constitutional law

Quality of educational opportunity does depend in substantial measure upon the number of dollars invested, notwithstanding that the impact upon students may be unequal because of other factors, natural or environmental. U.S.C.A. Const. Amend. 14; Const. 1947, Art. I, par. 1.

2. Constitutional law

The equal protection clause dictates statewide uniformity in the rudimentary scheme of local government, U.S.C.A. Const. Ameend. 14; Const. 1947, Art. I, par. 1.

3. Constitutional law

As to any governmental service to which equal protection is found to apply, if the monies are raised by local taxation in a way which permits different dollar expenditure per affected resident, the program is invalid as to the benficiaries unless state aid program fills the gap. U.S.C.A. Const. Amend. 14; Const. 1947, Art. I, par. 1.

4. Constitutional law

Any state aid program which did not neutralize local inequality would itself deny equal protection as to beneficiaries, U.S.C.A. Const. Amend. 14; Const. 1947, Art. I, par. 1.

5. Constitutional law

There inheres in the due process clause of the Fifth Amendment a guarantee of equal protection: it prohibits unjustifiable discrimination by the Congress. U.S.C.A. Const. Amend. 5.

6. Constitutional law

Equal protection clause of the State Constitution can be more demanding than the equal protection clause of the United States Constitution. U.S.C.A. Const. Amend. 14; Const. 1947, Art. I, par. 1.

7. Constitutional law

Wealth may or may not be invidious basis for the imposition of burden or enjoyment of a benefit. Const. 1947, Art. I, par. 1.

8. Municipal corporations

Taxation

The power to tax reposes in the state; municipalities have no inherent power to tax and can do so only pursuant to delegation of the state's power.

9. Municipal corporations

The state may compel municipalities to levy a tax with respect to matters committed to them as agencies of the state.

10. Taxation

Constitutional provision that property shall be assessed for taxation under general laws and by uniform rules and that all real property assessed and taxes locally would be assessed according to the same standard of value taxed at the general tax rate of the taxing district in which the property is situated was not intended to say that state function may be delegated to local government to be met by local taxation. Const. 1947, Art. IV, § VII, par. 9; Art. VIII, §§ I, par. 1, IV, VII, pars. 9(7), 12.

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11. Taxation

If the state decides to handle a service at State level and to do so on the basis of property tax, it must tax all taxable property in the state rather than only property in part of the state and if the responsibility for the state function is assigned to local government, the local tax must fall uniformly upon all taxable property within the county or the municipality, as the case may be. Const. 1947, Art. IV, § VII, par. 9; Art. VIII, §§ par. 1, IV, VII, pars. 9(7), 12.

12. Municipal corporations

Purpose of amendment to tax clause of the Constitution which speaks of an assessment and tax by the state for allotment and payment to taxing districts was to assure that all taxable property within municipality shall bear the same share of the tax burden of that municipality and it did not mean that local tax may not be levied to meet an assigned state responsibility. Const. 1947, Art. VIII, § I, par. 1.

13. Taxation

If the legislature should impose state property tax and distribute the proceeds to local government to use for public education, the tax would not fall within the provision of the tax clause of the Constitution which speaks of an assessment and tax by the state for allotment and payment to taxing districts; such tax would remain state tax notwithstanding the provisions appropriating its proceeds and it would not be a tax levied by the state for local purposes in lieu of tax for local purposes imposed directly through local taxation machinery. Const. 1947, Art. VIII, § I, par. 1.

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14. Schools and school districts

The Constitution places ultimate responsibility on the state for thorough and efficient education system. Const. 1947, Art. VIII, § I, par. 1.

15. Schools and school districts

If the state chooses to enlist local government to meet the state's obligation to support thorough and efficient system of free public schools it must do so in terms which will fulfill that obligation. Const. 1947, Art. VIII, § I, par. 1.

16. Schools and school districts

The constitutional provision for free public schools does not bar the delegation of the taxing responsibility to local government. Const. 1947, Art. VIII, § I, par. 1.

17. Schools and school districts

Whether the state acts directly to maintain thorough and efficient system of free public schools or imposes the role upon local government, the end product must be what the Constitution commands and a system of instruction in any district of the state which is not thorough and efficient falls short of the constitutional command and whatever the reasons for the violation, the obligation is the state's to rectify it. Const. 1947, Art. VIII, § I, par. 1.

18. Schools and school districts

If local government fails to maintain and support thorough and efficient system of free public schools, the state government must compel it to act, and if the local government cannot carry the burden, the state must itself

meet its continuing obligation. Const. 1947, Art. VIII, § I, par. 1.

19. Schools and school districts

The Constitution's guarantee of thorough and efficient system of public schooling must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as competitor in the labor market. Const. 1947, Art. VIII, § I, par. 1.

20. Schools and school districts

New Jersey system of financing public education which relies heavily on local taxation to furnish approximately 67% of public school costs, which leads to great disparity in dollar input per pupil and which has no apparent relation to mandate for equal educational opportunity is violative of the constitutional provision which imposes upon the state the obligation to furnish thorough and efficient system of public schooling. Const. 1947, Art. VIII, § I, par. 1; N.J.S.A. 18A:58-2, 3, 5, subds. a, b.

21. Schools and school districts

1970 Act which provides for school aid on basis of "weighted pupils" was not demonstrably designed to guarantee that local effort plus the state aid will yield to all the pupils in the state that level of educational opportunity which the Constitution mandates and the Act, even if fully funded, would not satisfy the constitutional obligation of the state to furnish thorough and efficient system of free public schools. Const. 1947, Art. VIII, § I, par. 1; N.J.S.A. 18A:58-2, 3, 5, subds. a, b.

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22. Schools and school districts

If the state chooses to assign its constitutional obligations to provide thorough and efficient system of free public schools to the local government, the state must do so by plan which will fulfill the state's continuing obligation and to that end the state must define in some discernible way the educational obligation and must compel the local school district to raise the money necessary to provide that opportunity. Const. 1947, Art. VIII, § I, par. 1.

23. Schools and school districts

The state's obligation to provide thorough and efficient system of free public schools includes capital expenditures as well as current operating expenses. Const. 1947, Art. VIII, § I, par. 1.

24. Schools and school districts

The state may recognize differences in area costs, or need for additional dollar input to equip classes of disadvantaged children for the educational opportunity without violating the Constitution. Const. 1947, Art. VIII, § I, par. 1; N.J.S.A. 18A:58-2, 3, 5, subds. a, b.

25. Schools and school districts

If the state assumes the cost of providing the constitutionally mandated education, it may authorize local governments to go further and to tax to that further end, provided that such authorization does not become device for diluting the state's mandated responsibility. Const. 1947, Art. VIII, § I, par. 1.

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26. Schools and school districts

Relief from unconstitutional system for financing public schools is prospective only. Const. 1947, Art. VIII, § I, par. 1; N.J.S.A. 18A:58-2, 3, 5, subds. a, b.

27. Schools and school districts

Even though present system of financing public schools is unconstitutional, obligations incurred must not be impaired and since government must go on, obligations thereafter incurred pursuant to existing statutes will be valid in accordance with the terms of the statutes. Const. 1947, Art. VIII, § 1, par. ¶ 1; N.J.S.A. 18A:58-2, 3, 5, subds. a, b.

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for appellants (*Mr. Stephen G. Weiss*, Special Counsel; *Mr. David S. Litwin* and *Ms. Mary Ann Burgess*, Deputy Attorneys General, on the brief; *Mr. George F. Kugler, Jr.*, Attorney General of New Jersey, attorney).

Mr. Harold J. Ruvoldt, Jr., argued the cause for respondents (*Messrs Ruvoldt and Ruvoldt*, attorneys, Special Counsel to *Mr. Samuel A. Scott*, Corporation Counsel of the City of Jersey City, *Mr. William A. Drier*, Corporation Counsel of the City of Plainfield, *Mr. Joseph A. LaCava*, Corporation Counsel of the City of Paterson, and *Mr. Julius Fielo*, Corporation Counsel of the City of East Orange).

Mr. Paul Tractenberg and *Mr. David G. Lubell*, of the New York bar, argued the cause for *amici curiae* Education Committee, Newark Chapter, National Association for the Advancement of Colored People and American

Civil Liberties Union of New Jersey (*Ms. Mary K. O'Melveny,* of the New York bar, of counsel; *Mr. William J. Bender* and *Mr. Frank Askin,* attorneys).

Mr. Arthur J. Sullivan, Jr., argued the cause for *amici curiae* City of Clifton and William Holster.

Mr. William H. Hyatt, Jr., argued the cause for *amicus curiae* Permanent Commission on State School Support (*Messrs. Pitney, Hardin and Kipp,* attorneys).

Mr. Melville D. Miller, Jr., argued the cause for *amicus curiae* New Jersey State Office of Legal Services.

The opinion of the Court was delivered by

WEINTRAUB, C. J. This case involves the constitutionality of statutes providing for the financing of elementary and secondary schools. The trial court found the existing system discriminates against students in districts with low real property ratables and also discriminates among taxpayers by imposing unequal burdens. These discriminations were held to violate the equal protection mandates of the Federal and State Constitutions. They were held also to violate other provisions of the State Constitution relating to public education and to the assessment of real property for taxation, to which we will refer later. The conclusion was that the State must finance the system out of State revenues raised by levies imposed uniformly on taxpayers of the same class. The holding was prospective only, and judicial relief was withheld until January 1, 1974 to permit the Legislature to adopt another plan, with the proviso that if a proper plan is not enacted by January 1, 1973, certain State moneys appropriated for distribution to school districts shall be distributed in harmony with the opinion rather than according to the statute's terms. 118 N. J. Super. 223 (Law Div. 1972).

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We certified the appeals before argument in the Appellate Division and stayed the operation of the judgment until our further order.

The system of meeting the current costs of our public schools is described in the trial court's opinion, 118 N. J. Super. at 228-231, and need not be repeated other than in its broad outlines. The funds are derived from three sources: local *ad valorem* taxation of real property, State aid, and federal aid. The trial court found that local taxes currently yielded 67% of the statewide total of operating expenses, State aid yielded 28% and federal aid the balance of 5%. 118 N. J. Super. at 231.

It is agreed there is a disparity in the number of dollars spent per pupil, depending upon the district of residence. As to the local property tax, the base is the taxable real property within the several districts, and of course the amount of taxable real property within a district is not related to the number of students within it. Although there is no statutory maximum upon the local tax for current educational expenses, there are practical limitations arising from the demands for other local services upon the same tax base. And it is clear also that State aid does not operate substantially to equalize the sums available per pupil.

[1] There was testimony with respect to the correlation between dollar input per pupil and the end product of the educational process. Obviously equality of dollar input will not assure equality in educational results. There are individual and group disadvantages which play a part. Local conditions, too, are telling, for example, insofar as they attract or repel teachers who are free to choose one community rather than another. But it is

nonetheless clear that there is a significant connection between the sums expended and the quality of the educational opportunity. And of course the Legislature has acted upon that premise in providing State aid on formulas designed to ameliorate in part the dollar disparities generated by a system of local taxation. Hence we accept the proposition that the quality of educational opportunity does depend in substantial measure upon the number of dollars invested, notwithstanding that the impact upon students may be unequal because of other factors, natural or environmental.

We accept also the trial court's findings of fact with respect to the existing disparities in expenditures per pupil, and we agree that the present situation cannot be reconciled with relevant constitutional requirements. But we do not accept the constitutional thesis expounded by the trial court. That thesis has implications beyond the subject of public education, and bears also upon the options available to the Legislature in meeting the State's obligation with respect to that specific subject matter.

I

We will consider first whether the equal protection clause of the Fourteenth Amendment and the equal protection provision implicit in Art. I, ¶ 1, of our State Constitution of 1947, *Bailey* v. *Engelman*, 56 N. J. 54, 55 (1970), reach our statutory scheme. It is urged, and the trial court agreed, that equal protection was denied both the students and the local taxpayers.

[2-5] It must be evident that the rudimentary scheme of local government is implicated by the proposition that

the equal protection clause dictates statewide uniformity. *West Morris Regional Board of Education* v. *Sills*, 58 N. J. 464, 477 (1971), cert. denied 404 U. S. 986, 92 S. Ct. 450, 30 L. Ed. 2d 370 (1971); see *James* v. *Valtierra*, 402 U. S. 137, 142-143, 91 St. Ct. 1331, 1334, 28 L. Ed. 2d 678, 683 (1971). This is so unless it can be said that the equal protection clause holds education to be a thing apart from other essential service which also depend upon local legislative decision with respect to the dollar amount to be invested. As to any service to which equal protection is found to apply, it would follow that if the moneys are raised by local taxation in a way which permits a different dollar expenditure per affected resident, the program is invalid as to the beneficiaries unless a State aid program fill in the gap. It would then follow that a State aid program which did not neutralize local inequalities would itself deny equal protection as to beneficiaries; and although it is not urged upon us that every federal statute must abide by that precept, we see no reason why that constitutional mandate would not also prevail at the federal level if the basic premise is sound.[1] Thus a federal program which provides funds on a matching or conditional basis with State or local option to participate or to choose a level of participation would be invidious as to those unequally benefited. That of course

[1] The concept of equal protection antedates the Fourteenth Amendment. It is implicit in a democratic form of government. The Declaration of Independence proclaimed that "All men are created equal," which must mean equality at the hands of government. There inheres in the due process clause of the Fifth Amendment a guarantee of equal protection; it prohibits unjustifiable discrimination by the Congress. Shapiro v. Thompson, 394 *U. S.* 618, 641-642, 89 S. Ct. 1322, 1335, 22 *L. Ed.* 2d 600, 619 (1969).

has not been the prevalent assumption. See statutes involved in *Charles C. Steward Machine Co.* v. *Davis,* 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279 (1937); and *James* v. *Valtierra, supra,* 402 U. S. 137, 91 S. Ct. 1331, 28 L. Ed. 2d 678. With respect to the categorical welfare programs under the Social Security Act which deal with the most basic need of food and shelter, the federal legislation does not comport with constitutional standards we are asked to find. Although local option permitted by the statute was an underlying fact in the decisions of the United States Supreme Court, the Court did not intimate that local option generates a constitutional problem. See *King* v. *Smith,* 392 U. S. 309, 318-319, 88 S. Ct. 2128, 2133-2134, 20 L. Ed. 2d 1118, 1126 (1968); *Rosado* v. *Wyman,* 397 U. S. 397, 407-408, 90 S. Ct. 1207, 1215-1216, 25 L. Ed. 2d 442, 453 (1970); *Dandridge* v. *Williams,* 397 U. S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970); see also *Bailey* v. *Engelman, supra,* 56 N. J. 54, 57, and *Motyka* v. *McCorkle,* 58 N. J. 165, 169 (1971).

The Court of Appeals for the Second Circuit recently rejected sundry constitutional challenges to the welfare programs under the Social Security Act. The plaintiffs there contended that the federal government, having entered the field was obliged to assume the entire cost of welfare, and that in any event due process and equal protection were denied because the federal contribution to the States was made under a formula based upon per capita income of the States rather than the number of persons in need. *City of New York* v. *Richardson,* 473 F. 2d 923 (2 Cir. 1973). Those propositions were rejected but that litigation suggests the distance the judiciary would travel if it found the Constitution dictated such single answers to the myriad, complex problems of today.

Appendix C

In *West Morris Regional Board of Education* v. *Sills, supra,* 58 N. J. 464, we dismissed a claim that the equal protection clause of the Fourteenth Amendment was offended by a statute providing for transportation of only those students at private schools who resided in school districts which furnished such transportation to public schools. We said "at least as of now, * * * there is no constitutional fiat that educational expenditures be identical for all students throughout the State" (p. 478). We thus read the decisions of the United States Supreme Court. We recognized that "It, of course, would be another matter, if local option were designed for an invidious end, such as racial discrimination" (p. 478), and cited in that regard *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964), and other cases.

The lead case finding that the federal equal protection clause requires statewide equality of expenditure per pupil is *Serrano* v. *Priest,* 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P. 2d 1241 (Sup. Ct. 1971). In finding that the Fourteenth Amendment applied, *Serrano* distinguished *McInnis* v. *Shapiro,* 293 F. Supp. 327 (N. D. Ill. 1968), affirmed *sub nom. McInnis* v. *Ogilvie,* 394 U. S. 322, 89 S. Ct. 1197, 22 L. Ed. 2d 308 (1969), and *Burruss* v. *Wilkerson,* 310 F. Supp. 572 (W. D. Va. 1969), affirmed 397 U. S. 44, 90 S. Ct. 812, 25 L. Ed. 2d 37 (1970). In *McInnis* and in *Burruss* three-man courts rejected equal protection attacks upon State school systems in which, as in the case before us, the expenditures per pupil varied because of local decision. The United States Supreme Court affirmed without discussion. *Serrano* found those cases to be different, saying the contention there rejected was that equal protection required equality measured by

the *needs* of pupils. That standard, *Serrano* said, would be judicially unmanageable, whereas equality of *dollar input,* the standard *Serrano* accepted, would present no such problem of judicial management and therefore was beyond the holding of *McInnis* and *Burruss.*[2]

Plaintiffs seek to bring this case within the doctrine, summed up in *Goosby* v. *Osser,* —— U. S. ——, 93 S. Ct. 854, 859, 35 L. Ed. 2d 36 (1973), that there must be applied "the more stringent compelling state interest test when either a fundamental right, such as the right to vote,[3] was allegedly infringed, *Reynolds* v. *Sims,* 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 86 S. Ct. 1079,

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[2] *Askew v. Hargrave,* 401 *U.S.* 476, 91 S. Ct. 856, 28 *L. Ed.* 2d 196 (1971), recognizes a potential for an equal protection complaint in this area. There the Florida statute provided that no State aid for education could be had if the *ad valorem* tax levied in a country for education *exceeded* a stated millage rate. A three-man court found the restriction, based as it was on amount of ratables without regard to the number of pupils, was "irrational," noting that it "*prevents* the *local Boards* from adequately financing their children's education." *Hargrave v. Kirk,* 313 *F. Supp.* 944, 949 (M. D. Fla. 1970). The Supreme Court vacated the judgment, saying the federal court should abstain until a pending attack in the State courts on State grounds is resolved, and adding that if the federal issue is thereafter reached, consideration should be given to the defense contention that the State's infusion of funds more than compensated for the loss of revenue caused by the limitation on the millage rate in the counties.

[3] We note that shortly after *Goosby v. Osser,* the Supreme Court decided *Mahan v. Howell,* —— *U. S.* ——, 93 *S. Ct.* 979, 35 *L. Ed.* 2d 320 (1973), which involved apportionment of a State legislature. The majority opinion applied the "rational basis" test.

16 L. Ed. 2d 169 (1966); *Carrington* v. *Rash,* 380 U. S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965), or when the statutory classifications were drawn on the basis of suspect criteria, such as wealth or race, *Harper* v. *Virginia Board of Elections, supra; McLaughlin* v. *Florida,* 379 U. S. 184, 192, 85 St. Ct. 283, 13 L. Ed. 2d 222 (1964); *Douglas* v. *California,* 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963)." Plaintiffs say that there is a "fundamental right" to education. They contend also that the statutory scheme results in a classification on the basis of "wealth" because the total of the taxable ratables within a school district plays at least a practical role in determining the dollar expenditure per pupil. Upon the premise that education is a "fundamental right" and upon the alternate premise that the statutes operate to place pupils in classes upon the basis of "wealth," plaintiffs say there must be a "compelling state interest" to support that classification and that the state interest is not "compelling."

A.

After this opinion was prepared, the United States Supreme Court decided *San Antonio Independent School District* v. *Rodriguez,* —— U. S. ——, 93 St. Ct. 1278, 35 L. Ed. 2d —— (1973). By a vote of 5 to 4 the Court reversed the district court's judgment which, following the lead of *Serrano,* had held the Texas statute denied school children equal protection of the law in violation of the Fourteenth Amendment. 337 F. Supp. 280 (W. D. Tex. 1972). The majority of the Supreme Court found the compelling state interest test did not apply, and that, measured by the conventional rational basis test, the Texas scheme was valid.

Appendix C

In holding the compelling state interest test did not apply, the majority concluded the Texas statute did not discriminate among children on the basis of wealth, and that the statute did not involve a "fundamental" right. The Supreme Court thus rejected both of the predicates for invoking the compelling state interest standard of review and the close scrutiny approach which that concept purports to involve.

With respect to the alleged classification on the basis of wealth, the majority found no ground in fact for the claim, saying (93 S. Ct. at 1292):

> "For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of "poor" people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible to identification in traditional terms."

The majority rejected the claim that because there were disparities in the taxable wealth of the districts, it followed there was discrimination against the residents of the less affluent districts. The majority stated its view this way (93 S. Ct. at 1294):

> "However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not sad-

> dled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

With respect to the alternate contention that education is a "fundamental" right within the compelling interest test, the majority pointed out that the equal protection clause did not itself generate substantive rights and thereupon assure equality with respect to them. The majority noted that the Federal Constitution did not explicitly or implicitly guarantee a right to education, and rejected a dissenting view that education nonetheless be deemed a fundamental right on the thesis that it serves a satellite role essential for the exercise of the First Amendment freedoms and of the right to vote. The majority added that in any event there was no proof that the Texas system "fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process" (93 S. Ct. at 1299).

Turning to the question whether the system "with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose." (93 S. Ct. at 1302), the majority found the system could not be said to deny equal protection. In essence the majority found that the State's dollar contribution "was designed to provide an adequate minimum educational offering in every school in the State" (93 S. Ct. at 1303): that the design was such that "each district would have some ability to provide a more enriched educational program"; and that "the primary distinguishing attributes of schools in property-affluent districts are lower pupil-teacher ratios and higher

salary schedules" (93 S. Ct. at 1303). The majority concluded it was rational for a State to call upon the local government to participate in this way in the rendition of this public service.

The majority of course did not say there could never be a successful equal protection attack in this area. Indeed, in footnote 107, the majority, speaking of Mr. Justice White's dissent, recognized that if a statute imposed a ceiling which barred desired tax increases in a district, there would be an arguable issue, the majority referring to *Hargrave* v. *Kirk* which we discussed in our footnote 2 above. And it must be recognized that the Texas system did not depend as heavily as ours upon the local tax effort. Texas contributed 50% of the total statewide current costs, the federal government contributed 10% and the local districts the remaining 40%. This contrasts with our scene, in which the local districts carry 67% of the total load with the State contributing but 28%. Further, the Texas statute stated minimum attributes for an educational opportunity and those attributes were met by the State's own contribution.[3a] But despite these differences,

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[3a] The opinion reads (93 S. Ct. 1303):

"The State's contribution, under the Minimum Foundation Program, was designed to provide an adequate minimum educational offering in every school in the State. Funds are distributed to assure that there will be one teacher — compensated at the state-supported minimum salary — for every 25 students. Each school district's other supportive personnel are provided for: one principal for every 30 teachers; one 'special service' teacher — librarian, nurse, doctor, etc.—for every 20 teachers; superintendents, vocational instructors, counselors, and educators for exceptional children are also provided. Additional funds are earmarked for current operating expenses, for student transportation, and for free textbooks."

we do not believe the majority would find a federal constitutional flaw in the case before us.

The majority recognized, as we have in this opinion, that the equal protection argument goes beyond the educational scene and implicates the entire concept of local government with local fiscal responsibility, saying (93 S. Ct. at 1307):

> "Appellees further urge that the Texas system is unconstitutionally arbitrary because it allows the availability of local taxable resources to turn on 'happenstance.' They see no justification for a system that allows, as they contend, the quality of education to fluctuate on the basis of the fortuitous positioning of the boundary lines of political subdivisions and the location of valuable commercial and industrial property. But any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others. Nor is local wealth a static quantity. Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions—public and private.
>
> Moreover, if local taxation for local expenditure is an unconstitutional method of providing for education then it may be an equally impermissible means of providing other necessary services cus-

> tomarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live."

In footnote 110, the majority added that "This Court has never doubted the propriety of maintaining political subdivisions within the States and has never found in the Equal Protection Clause any *per se* rule of 'territorial uniformity.'" (Citing cases.)

There emerges from the majority opinion an evident reluctance to say the Federal Constitution supplies single solutions by which all the States are bound. Although obviously not applauding the existing scene, the majority would leave the problem to the processes of the several States. In their words (93 S. Ct. at 1309).

> "The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems

> which may well have relied too long and too heavily on the local property tax. And certainly innovative new thinking as to public education, its methods and its funding, is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."

[6] The question whether the equal protection demand of our State Constitution is offended remains for us to decide. Conceivably a State Constitution could be more demanding. For one thing, there is absent the principle of federalism which cautions against too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances. The majority in *Rodriguez* expressly noted that "every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system," adding that "it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State" (93 S. Ct. at 1302).

We go then to the question whether our State guarantee of equal protection is offended. In preparing this opinion before the decision in *Rodriguez*, we considered both the federal and state equal protection issues in terms of the compelling state interest doctrine, because the doctrine

could not be ignored on the federal issue and because the parties presented the State constitutional issue in the same terms. That portion of our opinion (Point IB below) remains adequate with respect to the State equal protection issue and hence we have not altered it. We should not be understood, because of our treatment of the State equal protection issue in those terms, to embrace that doctrine in the application of the State equal protection issue.

In passing we note briefly the reason why we are not prepared to accept that concept for State constitutional purposes. We have no difficulty with the thought that a discrimination which may have an invidious base is "suspect" and will be examined closely. And if a discrimination of that kind is found, the inquiry may well end, for it is not likely that a State interest could sustain such a discrimination. But we have not found helpful the concept of a "fundamental" right. No one has successfully defined the term for this purpose. Even the proposition discussed in *Rodriguez*, that a right is "fundamental" if it is explicitly or implicitly guaranteed in the Constitution, is immediately vulnerable, for the right to acquire and hold property is guaranteed in the Federal and State Constitutions, and surely that right is not a likely candidate for such preferred treatment. And if a right is somehow found to be "fundamental," there remains the question as to what State interest is "compelling" and there, too, we find little, if any, light. Mechanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process clauses may only divert a court from the meritorious issue or delay consideration of it. Ultimately, a court must weigh the nature of the restraint or the

denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial. See, for example, *Jones* v. *Falcey,* 48 N. J. 25, 39-40 (1966); *Independent Electricians and Electrical Contractors' Association* v. *New Jerey Board of Examiners of Electrical Contractors,* 48 N. J. 413, 423-427 (1967); *Jackman* v. *Bodine,* 55 N. J. 371, 382-383 (1970).

B

We hesitate to turn this case upon the State equal protection clause. The reason is that the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which the State must act. The difficulties become apparent in the argument in the case at hand.

We will consider first the claim that there is classification according to "wealth," then the claim that a "fundamental right" is involved, and finally the claim that no "compelling state interest" warrants the statutory treatment of the subject.

[7] Wealth may or may not be an invidious basis for the imposition of a burden or for the enjoyment of a benefit. Wealth is not at all "suspect" as a basis for raising revenues. As to the taxpayer, classifications depend upon or reflect wealth except in the rare case of a head tax. Whether wealth is invidious in its impact upon

the enjoyment of rights or benefits is a more complex question, but again it cannot be said to be "suspect" in all settings. Obviously financial lack is a laudable basis when a statute seeks to ameliorate poverty. On the other hand, a net worth or poll tax requirement for voting is today[4] arbitrary. *Harper* v. *Virginia State Board of Elections,* 383 U. S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966); see *Kramer* v. *Union Free School District,* 395 U. S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969), and *Cipriano* v. *Houma,* 395 U. S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969). We know this would be equally true if one's right to migrate were sought to be conditioned upon net worth. *Cf. Shapiro* v. *Thompson, supra,* 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600. We can be sure the result would be the same if the right to attend elementary or secondary schools was made to depend upon the net worth of the pupil or of his parents.

The Legislature of course has not conditioned attendance at elementary and secondary schools upon the net worth of the pupil or his parents or even on the payment of a fee. Nor has the Legislature mandated that local government shall limit its current expenditures on the basis of the amount of ratables. The most that can be said is that, the subject having been committed in part to local government, the sums made available for education by local taxation have been influenced by the size of the tax base available for all activities of local government and by the judgment of local authorities as to how much shall be raised for all local needs.

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[4] Our State Constitution adopted in 1776 had net worth requirements for voting (*Art.* IV) and for election to office (*Art.* III).

In this respect education is handled no differently than sundry other essential services which are supplied on that basis. A signal feature of home rule as we know it is that the residents of a political subdivision are permitted within substantial limits to decide how much to raise for services which are necessary or sufficiently desirable to justify the exertion of the taxing power. How much will be done by local government may, of course, depend upon the size of its tax base, which, as to local government, is substantially the value of its real property. It is inevitable that expenditures per resident will vary among municipalities, resulting in differences as to benefits and tax burden. If this is held to constitute classification according to "wealth" and therefore "suspect," our political structure will be fundamentally changed. It has always been assumed that "taxes in different taxing districts in the State need not be uniform" as among the districts. 1 *Coley, Taxation* (Nichols, 4th ed. 1924) § 313, p. 649.

The other basis upon which plaintiffs seek to invoke the "compelling state interest" test is that education is a "fundamental right." The term "fundamental right" has not been defined. It is urged that education was so denominated in *Brown* v. *Board of Education*, 347 U. S. 483, 493, 74 S. Ct. 686, 691, 98 L. Ed. 873, 880 (1954), where the Court said that "Today, education is perhaps the most important function of state and local governments," and that "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." But it is perfectly clear that the issue in *Brown* was, in the Court's words, "Does segregation of children in public schools

solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" (347 U. S. at 493, 74 S. Ct. at 691, 98 L. Ed. at 880.) In short, *Brown* turned upon invidious classification on the basis of race. The answer would have been the same no matter where public education stood in a scale of values, whether that right was "fundamental" or something below it. It is significant that the Supreme Court has never cited *Brown* as a case involving the "fundamental right" concept. Indeed the first excerpt just quoted from *Brown* would affirmatively point the other way if the "fundamental right" doctrine was in mind since education is there recognized to be a most important function of "local governments" as well as of the State.

This is not to say that public education is not vital. Of course it is. Rather we stress how difficult it would be to find an objective basis to say the equal protection clause selects education and demands inflexible statewide uniformity in expenditure. Surely no need is more basic than food and lodging. As we have already noted, the categorical assistance programs supported by federal aid have a large element of State option resulting in fact in different levels of assistance per recipient in this country. Despite the fact that welfare is so singularly important that the Supreme Court held that benefits could not be terminated without prior hearing, *Goldberg* v. *Kelly*, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), the Court, in dealing with an equal protection claim revolving about the amount of benefits, applied the conventional standard for decision, *i. e.*, the existence of

a "rational" basis for the classification.[5] *Dandridge, supra,* 397 U. S. at 483-487, 90 S. Ct. at 1160-1163, 25 L. Ed. 2d at 500-503. Essential also are police and fire protection, as to which the sums spent per resident vary with local decision. Nor are water and sundry public health services available throughout the State on a uniform dollar basis.

It is argued that if the State decides that a service shall be furnished, the service should thereby become one

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[5] In *Lindsey v. Normet,* 405 *U. S.* 56, 92 S. Ct. 862, 31 *L. Ed.* 2d 36 (1972), the attack was upon a special statutory provision relating to summary dispossess actions. The Court rejected the claim that because housing was involved, the right of the occupant was "fundamental" requiring a "compelling governmental interest" to support the special treatment of these possessory actions. In rejecting that claim, the Court said (405 *U. S.* at 74, 92 S. Ct. at 874, 31 *L. Ed.* 2d at 50-51):

> "We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwelling of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.
>
> Since the purpose of the Oregon Forcible Entry and Detainer Statute is constitutionally permissble and since the classification under attack is rationally related to that purpose, the statute is not repugnant to the Equal Protection Clause of the Fourteenth Amendment."

of "fundamental right." In this connection reference is made to our constitutional provision that "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." Art. VIII, § 4, ¶ 1. Whether that provision itself assures to the student that there will be uniform dollar input or assures to the taxpayer that the tax base shall be statewide is another question dealt with below in Part II of this opinion. The proposition before us at the moment is that the equal protection clause takes over with that effect as to pupil or taxpayer or both because the obligation or responsibility is that of the State.

[8] The trouble with that approach is that ultimately all services categorized as "governmental" (rather than "coporate") are furnished pursuant to the obligation of the State, the municipal corporation being the State's agency or arm to render the service on its behalf. *Bergen County* v. *Port of New York Authority*, 32 N. J. 303, 312-314 (1960); 56 Am. Jur. 2d, Municipal Corporations, § 23, pp. 87-88. A municipality has been described as "simply an agency of the state for conducting, the affairs of government," *Atkin* v. *Kansas*, 191 U. S. 207, 221, 24 S. Ct. 124, 127, 48 L. Ed. 148, 157 (1903), as "merely a department of the state," *Trenton* v. *New Jersey*, 262 U. S. 182, 187, 43 S. Ct. 534, 537, 67 L. Ed. 937, 941 (1923). See also 1 *McQuillin, Municipal Corporations* (1971 rev. ed.) § 1.58, p. 83, and § 2.08, p. 142; *Cooley, Constitutional Limitations* (3d ed. 1874) *240. In this regard, the local school district is indistinguishable from other local governmental entities. As was said in *Landis* v. *Ashworth* (School District No. 44), 57 N. J. 509, 510 (Sup. Ct.

1895), in rejecting a claim that a school district could not tax:

> "This contention seems to us not well founded. School districts are formed for the purpose of aiding in the exercise of that governmental function which relates to the education of children, and to that end the legal voters of each district are entrusted with specified powers of local government, and the trustees whom they elect are made a body corporate to represent the district and its inhabitants. These characteristics mark them as political organizations. * * * They were so regarded in *State* v. *Deshler*, v *Dutcher* (25 N. J. L.) 177, where Mr. Justice Elmer said: 'School districts are only smaller municipalities * * *.'"

It is in this frame of reference that it was said long ago that "All taxes, whether levied for state, county or municipal purposes, are state taxes—they can be imposed by no other authority than that of the state. The state appropriates the proceeds to what purposes it sees fit; but, however the proceeds may be appropriated, every tax is a state tax." *State Board of Tax Assessors* v. *Central R. R. Co.*, 48 N. J. L. 146, 280 (E. & A. 1886); *Camden & Amboy R. R. & Tr. Co.* v. *Commissioners of Appeal*, 18 N. J. L. 71, 72 (Sup. Ct. 1840). In short, the power to tax reposes in the State; municipalities have no inherent power to tax and can do so only pursuant to a delegation of the State's power. *Salomon* v. *Jersey City*, 12 N. J. 379, 383-384 (1953).

[9] Hence the fact that the obligation to furnish a service is the State's could not serve as an index to the "fundamental" nature of the right to that service with-

out thereby encompassing a vast range of services now furnished through local government.[6] Nor can it matter that the service is expressly mandated by our State Constitution. For example, our State Constitution vests the judicial power "in a Supreme Court, a Superior Court, County Courts and inferior courts of limited jurisdiction" and provides that "The inferior courts and their jurisdic-

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[6] The range becomes evident from a body of case law involving the question whether the State may *compel* a municipality to levy a tax. The distinction is drawn between the functions assigned to local government as an agency of the State and those powers given local government for optional use to advance local or "corporate" interests. It is well settled that the State may compel municipalities to levy a tax with respect to matters committed to them as agencies of the State. 2 *McQuillin, Municipal Corporations* (3d ed. 1966 rev. vol.) § 4.159-4.162, *pp.* 248-253; 16*McQuillin, Municipal Corporations* (3d ed. 1972 rev. vol.) § 44.33, *pp.* 92-93. Speaking of the power thus to compel municipalities to levy taxes to meet their role as arms of the State government, it is pointed out in 1 *Cooley, Taxation* (Nichols 4th ed. 1924), § 418, p. 922:

> "* * * Taxes for local police protection and enforcement of the laws, for defense of both the local subdivision and the State, for highways and bridges and canals, for public health, for schools, for charity, are almost universally held not purely local in their character but instead governmental and so public in their nature that the legislature may require municipal or local taxation therefor."

The question sometimes arises under state constitutions which provide broadly that the legislature may not compel municipalities to impose taxes. Such restrictions are usually construed not to apply to "State" services and therefore not to prohibit statutes compelling local taxation as to such matters. Over the years the category of "State" services, within the meaning of such provisions, has expanded. See annotations, 46 *A. L. R.* 609 (1927); 106 *A. L. R.* 906 (1937).

tion may from time to time be established, altered or abolished by law." Art. VI, § 1, ¶ 1. Notwithstanding that the Constitution conspicuously requires the State to provide these indispensable services, it has always been thought to be appropriate to call upon the local government, primarily the counties, to house the courts and to provide personnel necessary for their functioning. Today the bulk of the cost of the judiciary is thus allocated, as are also most of the expenses of criminal prosecutions and of probation services; and since real property ratables are the basic source of local revenues and the amount of judicial activity is not proportional to the amount of ratables (or, for that matter, to population), the burden does not fall equally throughout the State.

And even if it could be concluded that either a "fundamental right" is involved or that there is a classification on the basis of "wealth," still there would be much obscurity on the remaining issue, whether the classification is justified by a "compelling state interest." Inherent in the concept of local government is the belief that the public interest is furthered when the residents of a locality are given some voice as to the amount of services and expenditures therefor, provided that the cost is borne locally to stimulate citizen concern for performance. Thus it may not be "irrational" to deal with education in those terms. The record before us reveals that only in Hawaii[6a] does State government meet the entire school bill, the State contributions in the other States averaging about 40% of the total cost. Presumably the "compelling state interest" test would demand more than rationality, but we

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[6a] We are informed by *Rodriguez* that Hawaii now permits school districts to raise additional moneys. 93 S. Ct. 1304 n. 102.

find no decision of the United States Supreme Court holding that the State's interest in the institution of local government would not be "compelling" or defining the limits upon the State's right to use the institution of local government if the State does have a sufficient interest to use that institution.

We repeat that our statutes do not demand unequal expenditures per pupil in the school districts. It is undeniable that local expenditures per pupil do vary, and generally because other essential services must also be met out of the same tax base and the total demands exceed what the local taxpayers are willing or able to endure. But for that same reason similar discrepancies, both as to benefits and burdens, can be found with respect to the other vital services which the State provides through its local subdivisions.[7] The equal protection proposition po-

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[7] That the equal protection contention is not easily limited to the subject of education is made evident by *City of New York* v. *Richardson, supra,* 473 F. 2d 923. It will be recalled that the court rejected a claim that the United States had to assume the entire cost of the welfare programs under the Social Security Act. The plaintiffs also alleged that the implementing State statute denied equal protection. It was alleged that the federal government reimburses New York for 50% of its total welfare costs, and that under the State statute, the City of New York is charged with 25% of the total cost and the State with the balance. The equal protection attack rested upon the allegation that in 1969 only 45% of the State's residents lived in New York City whereas the City was charged with financial responsibility for 74% of the State's welfare recipients, and that 12.52% of New York City's residents received public assistance as against an average of 3.49% for the balance of the State. The question was whether the trial court erred in dismissing the complaint which sought to have a three-

(Footnote continued on following page)

tentially implicates the basic tenet of local government that there be local authority with concomitant fiscal responsibility. The case now before us was not tried or argued in terms that local government as a political institution denies equal protection in New Jersey because unequal demands upon unequal tax bases result in statewide inequality as to benefits or as to tax burden. In these circumstances we will not pursue the equal protection issue in the limited context of public education.

Nor do we consider a question the parties have not projected, whether, apart from the equal protection guarantee, there is an implicit premise in the concept of local government that the State may not distribute its fiscal responsibility through that vehicle if substantial inequality will result. It may well be that at one time there was a rough correlation between the needs of an area and the local resources to meet them so that there was no conspicuous unfairness in assigning State obligations to the local units of government. Surely that is not true today in our State. Problems are now mobile. They have settled intensively in limited areas. Statewide there is no correlation between the local tax base and the number of pupils to be educated, or the number of the poor to

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(Footnote continued from preceding page)

man court convened. The Second Circuit concluded that the "compelling interest test" would not apply. Nonetheless it found that under the "rational relationship" standard, the unanswered allegations of the complaint presented a sufficiently substantial constitutional question to warrant convening a three-man court. The merits of course were not reached by the Second Circuit. We cite the Second Circuit case to emphasize that the equal protection issue advanced in the case before us may involve much more than public education.

be housed and clothed and fed, or the incidence of crime and juvenile delinquency, or the cost of police or fire protection, or the demands of the judicial process. Problems which are in no sense local in origin have become the special burden of those who cannot find a haven elsewhere.

We need hardly suggest the convulsive implications if home rule is vulnerable upon either of the grounds to which we have referred. Nor need we expound the difficulties of management of judicial solutions if the problem must be met by the courts. We point to the dimensions of the subject to explain why we should not deal with it on the record of this case.

II

The remaining question is whether certain provisions of our State Constitution, two dealing with public education and a third with the general subject of property taxation, impose the tax burden upon the State's own revenues.

The provisions relating to public education were added to the Constitution of 1844 by amendments adopted in 1875. Art. IV, § 7, ¶ 6, was amended by adding this sentence:

> "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years."

This provision is now Art. VIII, §4, ¶ 1, of the 1947 Constitution. The other amendment in 1875 added Art. IV,

§ 7, ¶ 11, which prohibits "private, local or special laws" in "enumerated cases," among which appears:

> "Providing for the management and support of free public schools."

The quoted provision is item (7) in Art. IV, § 7, ¶ 9, of the 1947 Constitution, with the word "control" substituted for the word "support."

The tax clause was also added by amendment in 1875 as Art. IV, § 7, ¶ 12, and then read:

> "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

That provision appears in the Constitution of 1947 as Art. VIII, § 1, ¶ 1, phrased this way:

> "Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, * * * and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district."

A.

The amendment concerning taxation as added in 1875 was not addressed to the subject of public education. Plaintiffs invoke it this way: They say that since the 1875 amendment concerning public education imposed the

school obligation on the State itself, a tax levied to discharge that, obligation must be deemed a "State" tax rather than a "local" one and hence, if it is to fall upon property, must fall uniformly upon all taxable property throughout the State.

[10, 11] The short answer is that the tax clause was not intended to say that a State function may not be delegated to local government to be met by local taxation. As we noted in Point I, local government is simply an arm of the State with respect to the many State functions which the State decides shall be performed through local government. The tax clause does not restrict the State with respect to that decision. Rather it means that if the State decides to handle a service at State level and to do so on the basis of a property tax, it must tax all taxable property in the State rather than only property in a part of the State; and that if the responsibility for the State function is assigned to local government, the local tax must fall uniformly upon all taxable property within the county or the municipality as the case may be.

We should comment upon *Society for Establishing Useful Manufactures* v. *City of Paterson*, 89 N. J. L. 208 (E. & A. 1916). The Society held a charter exemption from taxation of its property. At the time of that litigation, the exemption related to a local property tax but not to a "State" property tax. The case involved a statewide school tax on property, the proceeds of which were distributed to local school districts. The Society contended the tax was a local tax rather than a "State" tax. In holding the tax was a "State" tax, the court said (pp. 211-212):

> "But it is said that even if the tax be a state, and not a local one, it has not been laid 'for the use of

> the state,' within the meaning of that phrase as used in the society's charter. That is to say that, although the tax is laid by the state, it is required to be used for local and not for state purposes. As we have already pointed out, the people of this state, by the amendment to the constitution which we have cited, made the maintenance and support of free public schools a matter of state, instead of local, concern. The school tax is laid for the purpose of carrying out this state system of educating our children; it is used for that purpose; and such a use, in our opinion, is as much a state use as the appropriation of moneys to be expended in the support of the state government is an appropriation for a state use; the distribution by the state of the moneys so raised, in such a way as, in the judgment of the Legislature, would best subserve the purpose of the constitutional mandate being a mere matter of administration."

That case does not hold that the State's obligation under the education clause of the Constitution must be furthered only by a statewide tax. It holds only that if the States does choose to impose such a tax, it is a tax for a State use, notwithstanding that the proceeds are appropriated to local school districts for application to that State objective. Nor did that case suggest that a local tax for school purposes would be a "State" tax rather than a local one. No doubt the City of Paterson also levied a tax for school purposes, but the court did not hold that the tax thus levied locally was beyond the charter exemption with respect to "local" taxes because the tax was levied to fulfill the State's underlying school obligation.

[12, 13] We add that the amendment to the tax clause (Art. VIII, § 1, ¶ 1) made in 1947 which speaks of an as-

sessment and tax "by the State for allotment and payment to taxing districts" has no bearing upon the present case. Again we need not burden this opinion with an extended account of the controversy from which that language emerged. It is enough to say that the reference was to a tax levied for local purposes but which was handled administratively at State level to achieve uniformity as to valuation. More precisely, the subject was the taxation of railroad property. Railroad real property (other than the main stem) was subject to taxation for local purposes as was other real property. The assessment machinery, however, was handled by a State assessor on the premise that true value was better ascertained that way. The tax rate of each municipality was applied to the valuations found in that municipality, to the end that railroad property would bear its pro rata share of the burden of local government. When the Legislature in 1941 provided for a fixed rate of $3.00 on railroad property thus taxed for local use instead of the local (and higher) rate applicable to other real property taxable for local purposes, see *Jersey City* v. *State Board of Tax Appeals*, 133 N. J. L. 202 (Sup. Ct. 1945), modified *sub nom. Jersey City* v. *Kelly*, 134 N. J. L. 239 (E. & A. 1946), a political controversy followed. It led to the addition to the tax clause of the language of which we are now speaking. The intent was that if property is taxed *for local purposes*, then, whether the property is assessed and taxed locally or is assessed and taxed by the State for the benefit of the local taxing districts, the standard of value shall be the same and the rate shall be the general tax rate of the taxing district applicable to other property within the district. The purpose was to assure that all taxable property within a municipality shall bear the same share of the tax burden of that municipality. The provision thus added to the tax clause in 1947 has nothing to do with the ques-

tion whether the State may assign a State obligation to local government for discharge by it by use of revenues raised locally.[8] Nor does it mean that a local tax may not be levied to meet an assigned State responsibility.

B

Thus the 1875 tax clause and the 1947 version of it do not limit the legislative discretion with respect to whether to charge local governments with a fiscal obligation in connection with an assignment of the State responsibility for public education. The question, then, is whether that restriction reposes in the public education amendments of 1875 already cited. The Supreme Court of Michigan found that restriction in a provision of the Constitution of that State that "the Legislature shall maintain and support a system of free public elementary and secondary schools as defined by law * * *." *Milliken* v. *Green*, 389 Mich. 1, 203 N. W. 2d 457 (Sup. Ct. 1972). The vote was 4 to 3, and we understand a petition for rehearing has been granted. 41 U. S. L. W. 2424 (Feb. 13, 1973).

A brief sketch of public education in our State is a necessary backdrop for the issue. Originally education was the province of private schools, including, of course,

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[8] We add that if the Legislature should impose a State property tax and distribute the proceeds to local government to be used for public education, the tax would not fall within the language added to the tax clause in 1947. Such a tax would remain a State tax notwithstanding the provisions appropriating its proceeds. It would not be a tax levied by the State for local purposes in lieu of a tax for local purposes imposed directly through local taxation machinery. Hence the tax rate would be uniform throughout the State without regard to the several local tax rates upon property.

church-sponsored schools. Those too poor to pay tuition depended upon charity. In 1820 the townships were authorized to raise money by a vote at a town meeting but only for the education of "such poor children as are paupers." In 1828 the townships were authorized to raise moneys by vote at town meetings to build and repair schoolhouses. The State School Fund had been established in 1817 but it was not until 1829 that moneys were appropriated from that fund for the support of such schools. 1 *Myers, The Story of New Jersey* (1945) pp. 447-450. The Constitution of 1844 made a commitment by placing that fund, and all additions to it, beyond legislative diversion and mandating that the income "shall be annually appropriated to the support of public schools, for the equal benefit of all of the people of the state." Art. IV, § 7, ¶ 6. *Everson* v. *Board of Education of Ewing Township*, 133 N. J. L. 350, 352-353 (E. & A. 1945), affirmed 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

There emerged a program of State appropriation coupled with local taxation. The system worked unevenly, in part because of disparities as to ratables. Then it was the urban areas which had the greater capacity to pay. And public education was not free; it was the custom to charge tuition for public schools. 1 *Myers, The Story of New Jersey* (1945) pp. 458-460.

In his 1868 report (pp. 22-24), the State Superintendent of Public Instruction advocated free public schools for every district. He pointed out the school law "only gives to the people the privilege of making them [the schools] free, if they desire, by local taxation." The State appropriation was forty cents a child. The township tax, which could not exceed four dollars a child, actually amounted to about three dollars a child. The State Superintendent

said the average total of those items, $3.40 per child, "is not sufficient to make the schools free and keep them open a reasonable length of time during the year, hence the people are compelled either to charge tuition fees, or cause a local tax to be assessed." Schools were free in the cities and in about half the rural districts because city and district taxes were also levied. He concluded that "We need, therefore, a general school fund sufficient to maintain the ordinary grade of schools at times when no extra or unusual expenses are incurred, and a district tax to be assessed in those districts where the people, with more than ordinary enterprise, desire a better grade of schools than can be supported by the general fund, and in all districts where additional funds are needed to erect, furnish, or repair school buildings." The "general fund" to which he referred consisted of the State appropriation and the township school tax. He proposed that the township tax be replaced with an adequate State appropriation to cover current operating expenses. His views received strong public support; the Legislature in 1872 almost unanimously passed "an act to make free the public schools of the State." 1 *Myers, op. cit.*, p. 472.

The 1871 statute (c. 527, p. 94), inaugurated a statewide school tax of 2 mills per dollar of assessed value of property, the tax "to be in lieu of all township school taxes * * * but if the moneys received by any township from the tax imposed by this act shall not be sufficient to maintain free schools for at least nine months in each year, then the inhabitants thereof shall raise, by township tax, such additional amount as they may need for that purpose," on pain of losing their share of the State tax. Sec. 1, p. 94. The State tax was apportioned on the basis of the number of children included in the school census.

Secs. 4 and 5, pp. 95-96. Each city and school district remained empowered to "raise by tax such other sums of money as they may need for school purposes," as authorized by prior law. Sec. 7, p. 96. It was made unlawful thereafter to charge tuition fees. Sec. 9, p. 97.

Thus public schools became free. It is notable that the proceeds of the statewide property tax were apportioned on the basis of the number of eligible pupils rather than the value of local ratables or the amounts the State tax yielded in the several districts. A shift to a ratables formula was made later, after the adoption of the 1875 amendment, for a reason unrelated to the equity of the 1871 basis for apportionment of the tax proceeds. The wealthier counties complained that the rural areas abused the statutory formula by deliberately undervaluing their ratables to avoid a fair share of the burden of the State tax. The charge was credited, and in 1881, to remedy that abuse, the basis for the apportionment of the tax revenues was changed to the tax contributions of the counties (*i. e.*, the assessed value of the ratables) with respect to 90% of the State tax proceeds, the remaining 10% to be distributed equitably by the State Board of Education. *New Jersey School Report for* 1881, pp. 29-32. The 10%, which was used to aid the poorer counties, was later whittled down upon the continuing complaint of the more affluent counties. *Bateman Report* (1968), p. 16. Thus the State seemingly drifted into a formula of apportionment in which ratables rather than pupils became so prominent, not because ratables were deemed the fair basis for distribution of the tax proceeds, but as an antidote for an abuse with respect to valuation of the tax base. Had there been employed a direct remedy, *i. e.*, statewide equalization of the assessments, thereby to insure an even

distribution of the tax burden, it is likely that the per-pupil basis for distribution of the statewide tax proceeds would have retained its inherent equitable appeal.

The 1875 amendment added to Art. IV, § 7, ¶ 6, of the Constitution of 1844 the provision that:

> "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years."

There appears to be no helpful history spelling out the intended impact of this amendment.

[14] We can be sure the amendment was intended to embody the principle of the 1871 statute that public education for children shall be *free*. It is also plain that the ultimate responsibility for a thorough and efficient education was imposed upon the State. This has never been doubted.[9] See, for example, the passage we quoted above

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[9] So in construing the statutes relating to the responsibilities of the State Commissioner of Education, we have repeatedly held it to be his affirmative obligation to see to it that the statutory objectives are met, and this on the premise that the Constitution having placed the responsibility on the State, the statutes should be read to mean that the State Commissioner shall see to it that the school districts abide by that mandate in their discharge of the delegated responsibility. Thus we held with respect to a dispute over the amount of a local school budget, the the State Commissioner "is charged with the overriding responsibility of seeing to it that the mandate for a thorough and efficient system of free public schools is being carried out," *Board of Education, E. Brunswick Tp.* v. *Tp. Council, E. Brunswick*, 48 N. J. 94, 106 (1966), and that "it is the duty of the Commissioner to see to it that every

(Footnote continued on following page)

from *Society for Establishing Useful Manufactures* v. *City of Paterson, supra,* 89 N. J. L. at 211-212.

[15] The obligation being the State's to maintain and support a thorough and efficient system of free public schools, the State must meet that obligation itself or if it chooses to enlist local government it must do so in terms which will fulfill that obligation. But plaintiffs say that although the operation of schools may be delegated, the fiscal responsibility may not. Plaintiffs assert the amendment itself assures equality as among taxpayers. Alternatively they say the amendment assures equality among the pupils of the State and that such equality is not achieved and cannot be achieved by a system of taxation which depends upon the existing local tax base.

[16] We cannot say the amendment of 1875 was intended to bar the delegation of the taxing responsibility to local government. We know that with respect to the cost of providing the schoolhouse itself, the 1871 statute left the burden with local government and that burden

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(Footnote continued from preceding page)

district provides a thorough and efficient school system," *Board of Education of the City of Elizabeth* v. *Elizabeth,* 55 N. J. 501, 506 (1970). So too with respect to an issue of racial imbalance we said that "when the sufficiency of the local choice is brought before him [the State Commissioner] he must affirmatively determine whether the reasonably feasible steps towards desegregation are being taken in proper fulfillment of State policy; if not, he may remand the matter to the local board for further action or may prescribe a plan of his own * * *." *Booker* v. *Board of Education, Plainfield,* 45 N. J. 161, 178 (1965). Upon the same premise, we held that the State Commissioner could, to cope with a problem of racial balance, order a solution which crosses district lines if such a solution is not impractical. *Jenkins* v. *Township of Morris School District,* 58 N. J. 483 (1971).

continued there after the 1875 amendment. As the State Superintendent's report for 1881 put it, "The spirit of the school law of New Jersey is that the State shall furnish the means for maintaining the schools while the local authorities shall provide suitable school accommodations" (p. 42). The 1871 statute was concerned with current operating expenses, and as to that subject, the statute was intended to raise by a statewide tax a general fund sufficient to meet the average per-pupil cost of providing the level of instruction then in view, with the city and school district retaining the power to tax to the end that districts "with more than ordinary enterprise," as the 1868 report quoted above expressed it, could provide education above the level the general State fund was intended to provide.

The question whether the tax burden should be borne statewide rather than locally was of course very much in mind at the time of the 1875 amendment. It was discussed in the State Superintendent's reports both before and after the adoption of the amendment.

In his report for 1871 the State Superintendent said "The townships are still authorized to vote school money, and they are even required to do so in case the money derived from the State is not sufficient to maintain free schools nine months, but the amount to be voted will not be, as heretofore, the principal fund upon which the schools are to depend for their support. The principal support will come from the State, and if any sum is needed to be voted by the townships it will be small, and will not meet with that opposition that it has heretofore" (p. 12). He added that "A State school tax is

preferable to a local school tax also, because it is more just, equal, and uniform," pointing out that if the sum of $4.25 needed per child and apportioned under the State school tax were raised by a county tax, county tax rates would vary from 1.4 mills to 4.6 mills (pp. 12-13).

The State Superintendent's report for 1878 speaks of the tax system as satisfying "a matter of equity that the expenses incurred in maintaining the schools needed to impart this education, shall be borne by all alike" (p. 23). He continued that "New Jersey recognizes the wisdom of this in assessing a uniform rate of tax upon each citizen for the support of her schools, in proportion to the amount of property he possesses, and in apportioning the amount thus raised to the several school districts on the basis of their school census" (p. 23). He was speaking in opposition to the view of the wealthier counties that the school burden should be borne by the counties, saying that "What would render this still more unfair is that the poorer the county the heavier would be the rate of taxation to insure equal benefits"; that "It costs about $5 per child to support Public Schools" and "To raise this sum as proposed, the rate of taxation in some of the counties, because of their poverty, would be three times as great as in others, because of their wealth" (pp. 23-24).

One gathers that the 1871 formula was thought to operate equitably with respect to the taxpayers as well as the children despite the fact that capital costs remained the local burden and that some but not all of the city and school districts chose to provide for additional current

expenditures.[10] But we can find no evidence that the amendment of 1875 was concerned with taxpayers and was intended to incorporate a principle that the tax burden must be met by a statewide tax.

It seems clear that the 1875 amendment has not been understood to prohibit the State's use of local government with local tax responsibility in the discharge of the constitutional mandate. In *Landis* v. *Ashworth* (*School District No. 44*), *supra*, 57 N. J. L. 509, a local tax for school purposes was attacked. One ground was that the school district was not a political division of the State capable of being invested with the power to tax. As we have already mentioned, *Landis* rejected that view, finding the school district was a municipality.

Also relevant are cases which involved the question whether school districts could be classified for legislation under the companion amendment of 1875 prohibiting local or special laws "Providing for the management and support of free public schools." Art. IV, § 7, ¶ 11, of the Constitution of 1844 (now Art. IV, § 7, ¶ 9(7)). At one point doubt was expressed as to whether school districts could be classified in the face of that prohibition, *Law-*

[10] The report of the State Superintendent for 1878 reveals that for the school year ended August 31, 1878, the two-mill State tax appropriated by the State amounted to $1,132,501.38; that there was an additional State appropriation of $100,000; and that the township school tax was but $24,387, while the district and city school tax for teachers' salaries yielded $302,630.59 and district and city school taxes for building and repairing schoolhouses amounted to $379,806.66 (p. 7). The report discloses that 246 districts raised taxes to pay teachers' salaries, 337 districts raised taxes to build schoolhouses, and 936 districts imposed no tax at all (p. 8).

thorp v. Trenton, 62 N. J. L. 795 (E. & A. 1898), which issue was resolved in favor of the power to classify in *Riccio v. Hoboken,* 69 N. J. L. 649 (E. & A. 1903), but in neither case was it doubted that the State could invest the responsibility, including the taxing power in local government. Rather the question was whether all such local school governments must be of one structure. The 1875 amendments were assumed to permit the State to delegate "taxing powers to local school districts to raise funds for local school purposes," in *Everson* v. *Board of Education of Ewing Township, supra,* 133 N. J. L. at 353.

It has been noted that the 1947 Constitutional Convention did not act upon a recommendation of the New Jersey Federation of Labor that education be funded out of State revenues. 5 *Proceedings of the New Jersey Constitutional Convention of 1947,* Appendix at 893. Such inaction is of doubtful import, but our Constitution was amended in 1958 in terms which did assume that fiscal responsibility was properly reposed in the local school district. Art. VIII, § 4, ¶ 2, which preserves the fund for the support of free public schools, was amended by adding:

> "The bonds of any school district of this State, issued according to law, shall be proper and secure investments for the said fund and, in addition, said fund, including the income therefrom and any other moneys duly appropriated to the support of free public schools may be used in such manner as the Legislature may provide by law to secure the payment of the principal of or interest on bonds or notes issued for school purposes by counties, mu-

nicipalities or school districts or for the payment of purchase of any such bonds or notes or any claims for interest thereon."

[17, 18] In the light of the foregoing, it cannot be said the 1875 amendments were intended to insure statewide equality among taxpayers. But we do not doubt that an equal educational opportunity for children was precisely in mind. The mandate that there be maintained and supported "a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years" (can have no other import. Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands. A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, the obligation is the State's to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation.

We refer again to *Landis* v. *Ashworth* (*School District No. 44*), *supra,* 57 N. J. L. 509. There it was contended that the 1875 amendment prohibiting a special or local law with respect to the management and support of free public schools forbade "laws delegating to each school district the power of determining for itself what amount beyond the state appropriation shall be raised by tax therein for the support of schoolhouses and employing teachers, result in affording different degrees of instruction to the children in different districts, while it is the duty of the legislature to see that the same facilities for

education are furnished to every child in the state" (pp. 511-512). As we have just noted, that contention was based upon the "special or local law" provision of the Constitution. The court replied that a statute conferring the same powers upon the same class of political bodies does not cease to be a general law because the results may not be uniform. But the court did find that the 1875 amendment which imposed the school obligation on the State required equality within the intended range of that amendment, permitting local decisions only above and beyond that mandated education. The court said (p. 512):

> "Nor can I think that the constitution requires the legislature to provide the same means of instruction for every child in the state. A scheme to accomplish that result would compel either the abandonment of all public schools designed for the higher education of youth or the establishment of such schools in every section of the state within reach of daily attendance by all the children there residing. Neither of these consequences was contemplated by the amendment of 1875. Its purpose was to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship; and such provision our school laws would make, if properly executed, with the view of securing the common rights of all, before tendering peculiar advantages to any. But beyond this constitutional obligation, there still exists the power of the legislature to provide, either directly or indirectly, in its discretion, for the further instruction of youth in such branches of learn-

> ing as, though not essential, are yet conducive for the public service. On this power, I think, rest the laws under which special opportunities for education at public expense are enjoyed."

[19] *Landis* could be misread if it is not kept in mind that when *Landis* was decided (1895), secondary schooling as we know it today was not generally available. *Bole and Johnson, The New Jersey High School: A History* (1964) pp. 28-36. It was not then an attribute of a thorough and efficient system of public schooling, and for that reason *Landis* found the constitutional requirement was not offended by the fact that "higher education" was not available for all children. But *Landis* held that the education comprehended by the constitutional obligation must be met by "securing the common rights of all." And *Landis* of course did not say the common rights were those of 1875 or 1895. Today, a system of public education which did not offer high school education would hardly be thorough and efficient. The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.

We are brought then to the question whether the State has fulfilled its obligation to afford all pupils that level of instructional opportunity which is comprehended by a thorough and efficient system of education for students between the ages of 5 and 18. This is the question we flagged in *West Morris Regional Board of Education* v. *Sills*, 58 N. J. 464, 477 n.7 (1971), when we said "We of course do not anticipate the question whether the State statutory scheme may, because of local failures, become unequal to the constitutional promise and command."

Appendix C

[20] The trial court found the constitutional demand had not been met and did so on the basis of discrepancies in dollar input per pupil. We agree. We deal with the problem in those terms because dollar input is plainly relevant and because we have been shown no other viable criterion for measuring compliance with the constitutional mandate. The constitutional mandate could not be said to be satisfied unless we were to suppose the unlikely proposition that the lowest level of dollar performance happens to coincide with the constitutional mandate and that all efforts beyond the lowest level are attributable to local decisions to do more than the State was obliged to do.

Surely the existing statutory system is not visibly geared to the mandate that there be "a thorough and efficient system of free public schools for the instruction of all the children in this state ebetween the ages of five and eighteen years." Indeed the State has never spelled out the content of the educational opportunity the Constitution requires. Without some such prescription, it is even more difficult to understand how the tax burden can be left to local initiative with any hope that statewide equality of educational opportunity will emerge. The 1871 statute embraced a statewide tax because it was found that local taxation could not be expected to yield equal educational opportunity. Since then the State has returned the tax burden to local school districts to the point where at the time of the trial the State was meeting but 28% of the current operating expenses. There is no more evidence today than there was a hundred years ago that this approach will succeed.

On its face the statutory scheme has no apparent relation to the mandate for equal educational opportunity.

Appendix C

The trial court's opinion discusses the existing scheme at length, and we need but summarize it. As the trial court pointed out, we are in a period of transition from one plant to another with respect to the current operating budget. The new plan, contained in the "State School Incentive Equalization Aid Law" (L. 1970, c. 234), herein the "1970 Act," is but partially funded, and at the moment serves only to accomplish a modification of the plan it would one day supersede.

The plan which the 1970 Act would ultimately replace establishes a foundation program of $400 per pupil, N. J. S. A. 18A:58-3 as it existed when the 1970 Act was enacted. We are told that when that dollar figure was set, it was believed to be the average per pupil cost of providing elementary and secondary education. The figure is now grossly outdated. At any rate, that statute provides for State aid consisting of the difference between $400 per pupil and the sum for pupil raised by a local tax of 10½ mills per dollar of equalized valuation of taxable property within the school district. There is a minimum guaranty of $75 per pupil, and by other provisions the State adds an additional $25 per pupil throughout the State and $27 per pupil in the major cities.

Under that program the State contributes about 28% of the statewide current operating costs, the balance being raised by local tax except for a small federal contribution. The 1970 Act is expected when fully funded to raise the State's share to 40% which, when that Act was adopted, was said to be the national average of State aid.

The 1970 Act provides for State aid on the basis of "weighted pupils." The weighting is intended to reflect different costs of educating classes of pupils. Thus, to

mention some of the categories, a child in kindergarten is weighted at .75, a child in elementary school at 1., and a high school student at 1.3, plus .75 units for each "AFDC" child (a child on welfare). N.J.S.A. 18A:58-2. The 1970 Act further provides that the amount of State aid per resident weighted pupil will depend on whether the school district is a "nonoperating district" (does not itself operate schools), a "basic district," a "limited district," an "intermediate district" a "precomprehensive district," or a "comprehensive district." The 1970 Act would assure "minimum support aid" which would depend upon the classification of the districts, the figure ranging from $110 per weighted pupil in a "basic district" to $160 per weighted pupil in a "comprehensive district." N.J.S.A. 18A:58-2; 18A:58-5a. We understand the criteria for these districts have not yet been established or enacted into law, and that all operating districts are for the moment deemed to be "basic districts."

In addition the 1970 Act contemplates "incentive equalization aid." N.J.S.A. 18A:58-5b. As we understand the program, it provides for additional State aid with respect to the "net operating budget," which, roughly, is the amount of the current expense budget after deducting certain income including the "minimum support aid" described in the paragraph above. The net operating budget is thus the net sum which would remain to be raised by local taxation, and the "incentive equalization aid" is payable with respect to that net sum. Again the amount of that aid is geared to the standing of each district in the scale mentioned above ranging from a "basic district" to a "comprehensive district." For the purpose of calculating the "incentive equalization aid" a "school district guaranteed valuation" is found for the district by multiplying

the number of resident weighted pupils by a valuation per pupil ranging from not less than $30,000 in a "basic district" to not less than $45,000 in a "comprehensive district." N.J.S.A. 18A:58-2. If the "school district guaranteed valuation" is less than the equalized valuation of the district, no incentive equalization aid will be paid; and if the guaranteed valuation is more than the equalized valuation, then the "net operating budget" is divided by the "guaranteed valuation," and the resulting rate is applied to so much of the guaranteed valuation as exceeds the equalized valuation, to obtain the amount of the incentive equalization aid. N.J.S.A. 18A:58-5b.

As we have said, the 1970 Act is not fully funded. As of the time of trial, the State aid consisted of the aid under the pre-1970 statutes plus 20% of the difference between that sum and the sum which the 1970 Act would yield if fully funded. Again, since the criteria for the classification of operating districts from "basic" to "comprehensive" have not been established, all districts are deemed to be "basic" for the computation. We note, too, that under the 1970 Act there is a save-harmless provision assuring each district without regard to its wealth that the 1970 Act will not reduce its aid.

[21] We have outlined the formula of the 1970 Act to show that it is not demonstrably designed to guarantee that local effort plus the State aid will yield to all the pupils in the State that level of educational opportunity which the 1875 amendment mandates. We see no basis for a finding that the 1970 Act, even if fully funded, would satisfy the constitutional obligation of the State.

The *Bateman Report* correctly observes that "Basic in any State support plan is the concept that education is

a State and not a local responsibility" (p. 2). The Report then explains that "This means that the State has a responsibility not only to provide financial assistance to the local district but also to delineate the broad terms of operation of the local district, both financially and educationally" (pp. 2-3). The Report acknowledges that one difficulty with the design for local fiscal responsibility is that the tax base to which the school districts are remitted is already overloaded, particularly in the major cities, by the other demands for local service. But as to this factor so critical in any system of local responsibility and incentive-based State aid, the Report recommends further study (pp. 42-43).

[22] We repeat that if the State chooses to assign its obligation under the 1875 amendment to local government, the State must do so by a plan which will fulfill the State's continuing obligation. To that end the State must define in some discernible way the educational obligation and must *compel* the local school districts to raise the money necessary to provide that opportunity. The State has never spelled out the content of the constitutionally mandated educational opportunity. Nor has the State *required* the school districts to raise moneys needed to achieve that unstated standard. Nor is the State aid program designed to compensate for local failures to reach that level. It must be evident that our present scheme is a patchy product reflecting provincial contests rather than a plan sensitive only to the constitutional mandate.

[23] We have discussed the existing scene in terms of the current operating expenses. The State's obligation includes as well the capital expenditures without which the required educational opportunity could not be provided.

Appendix C

Upon the record before us, it may be doubted that the thorough and efficient system of schools required by the 1875 amendment can realistically be met by reliance upon local taxation. The discordant correlations between the educational needs of the school districts and their respective tax bases suggest any such effort would likely fail, and this wholly apart from the issues we left unresolved in Point I.

Although we have dealt with the constitutional problem in terms of dollar input per pupil, we should not be understood to mean that the State may not recognize differences in area costs, or a need for additional dollar input to equip classes of disadvantaged children for the educational opportunity.[11] Nor do we say that if the State assumes the cost of providing the constitutionally mandated education, it may not authorize local government to go further and to tax to that further end, provided that such authorization does not become a device for diluting the State's mandated responsibility.

The present system being unconstitutional, we come to the subject of remedies. We agree with the trial court that relief must be prospective. The judiciary cannot unravel the fiscal skein. Obligations incurred must not be impaired. And since government must go on, and some period of time will be needed to establish another statutory system, obligations hereafter incurred pursuant to existing statutes will be valid in accordance with the terms of the statutes. In other respects we desire the

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[11] See *Lau* v. *Nichols*, 472 F. 2d 909 (9 Cir. 1973), where the court divided upon whether equal protection required that non-English speaking Chinese students be provided with bilingual compensatory education in the English language.

further views of the parties as to the content of the judgment, including argument as to whether the judiciary may, as the trial court did with respect to the "minimum support aid" and the save-harmless provision of the 1970 Act, 118 N. J. Super. at 280-281, order that moneys appropriated by the Legislature to implement the 1970 Act shall be distributed upon terms other than the legislated ones. A short date for argument will be fixed.

Subject to the modifications expressed in this opinion and the matters reserved in the preceding paragraph, the judgment of the trial court is affirmed.

For affirmance and modification—Chief Justice WEINTRAUB, Justices JACOBS, HALL, MOUNTAIN and SULLIVAN, and Judges CONFORD and LEWIS—7.

For reversal—None.

APPENDIX D

Opinion of the Supreme Court of New Jersey (63 N. J. 196)

KENNETH ROBINSON, AN INFANT, BY HIS PARENT AND GUARDIAN AD LITEM, ERNESTINE ROBINSON, ET AL., PLAINTIFFS-RESPONDENTS, v. WILLIAM T. CAHILL, GOVERNOR OF THE STATE OF NEW JERSEY, ET AL., DEFENDANTS-APPELLANTS.

Argued May 7, 1973—Decided June 19, 1973.

SYNOPSIS

Action was brought by residents, taxpayers and various municipal officials challenging constitutionality of system of financing public schools of State. The Superior Court, Law Division, 118 N. J. Super. 223, supplemented in 119 N. J. Super. 40, entered judgment declaring system unconstitutional and the defendant state officials appealed. The Supreme Court, 62 N. J. 473, modified the judgment and as modified affirmed. After further argument the Supreme Court held that Supreme Court, which had benefit of further argument after holding that system of financing public schools in New Jersey was unconstitutional, determined that it would not disturb the statutory scheme unless Legislature failed to enact, by December 31, 1974, legislation compatible with decision and effective no later than July 1, 1975, and jurisdiction was retained for appropriate relief if circumstances warranted it.

Jurisdiction retained.

Appeal and error

Appendix D

Supreme Court, which had benefit of further argument after holding that system of financing public schools in New Jersey was unconstitutional, determined that it would not disturb the statutory scheme unless Legislature failed to enact, by December 31, 1974, legislation compatible with decision and effective no later than July 1, 1975 and jurisdiction was retained for appropriate relief if circumstances warranted it.

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for appellants (*Mr. Stephen G. Weiss,* Special Counsel; *Mr. Lewis M. Popper* and *Mr. Omer F. Brown, II,* Deputy Attorneys General, on the brief; *Mr. George F. Kugler, Jr.,* Attorney General of New Jersey, attorney).

Mr. William H. Hyatt, Jr., argued the cause for *amicus curiae Permanent Commission on State School Support* (*Messrs. Pitney, Hardin and Kipp,* attorneys).

Mr. Harold J. Ruvoldt, Jr., argued the cause for respondents (*Messrs, Ruvoldt and Ruvoldt,* attorneys, and Special Counsel to *Mr. Samuel C. Scott,* Corporation Counsel of the City of Jersey City, *Mr. William A. Drier,* Corporation Counsel of the City of Plainfield, *Mr. Adolph Romei,* Corporation Counsel of the City of Paterson, and *Mr. Julius Fielo,* Corporation Counsel of the City of East Orange).

Mr. Paul Tractenberg and *Mr. David G. Lubell,* of the New York bar, argued the cause for *amici curiae* Education Committee, Newark Chapter, National Association for the Advancement of Colored People and American Civil Liberties Union of New Jersey (*Messrs. William J. Bender* and *Frank Askin,* attorneys).

Appendix D

Mr. Melville D. Miller, Jr. argued the cause for *amicus curiae* New Jersey State Office of Legal Services.

PER CURIAM. In the opinion filed in this matter, 62 N. J. 473, 520-521 (1973), we said:

> The present system being unconstitutional, we come to the subject of remedies. We agree with the trial court that relief must be prospective. The judiciary cannot unravel the fiscal skein. Obligations incurred must not be impaired. And since government must go on, and some period of time will be needed to establish another statutory system, obligations hereafter incurred pursuant to existing statutes will be valid in accordance with the terms of the statutes. In other respects we desire the further views of the parties as to the content of the judgment, including argument as to whether the judiciary may, as the trial court did with respect to the "minimum support aid" and the save-harmless provision of the 1970 Act, 118 N. J. Super. at 280-281, order that moneys appropriated by the Legislature to implement the 1970 Act shall be distributed upon terms other than the legislated ones. A short date for argument will be fixed.

We have had the benefit of further argument. It is our view that the Court should not disturb the statutory scheme unless the Legislature fails to enact, by December 31, 1974, legislation compatible with our decision in this case and effective no later than July 1, 1975. We withhold ruling upon the question whether, if such legislation is not so adopted, the Court may order the distribution of appropriated moneys toward a constitutional objective notwithstanding the legislative directions.

Appendix D

We retain jurisdiction. Any party may move for appropriate relief, before or after December 31, 1974, if new circumstances so warrant.

For affirmance as modified—Chief Justice WEINTRAUB, Justices JACOBS, PROCTOR, MOUNTAIN and SULLIVAN, and Judges CONFORD and COLLESTER—7.

For reversal—None.

APPENDIX E

Motion for Extension of Time to Petition for Rehearing

SUPREME COURT OF NEW JERSEY
Docket No. 8618

KENNETH ROBINSON, an infant, by his parent and guardian ad litem, ERNESTINE ROBINSON, et al.,

Plaintiffs-Respondents

v.

WILLIAM T. CAHILL, Governor of the State of New Jersey, et al.,

Defendants-Appellants

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of New Jersey:

The Defendants-Appellants, William K. Dickey, as a named party to this appeal, and Alfred N. Beadleston and Thomas H. Kean as successors in office to the named parties, Raymond H. Bateman and William K. Dickey (respectively as President of the New Jersey Senate and Speaker of the General Assembly of the State of New Jersey), move pursuant to Rules 1:3-4 and 2:9-2 for an order extending the time within which said Defendants-Appellants may petition for a rehearing in this cause until 30 days from the date of the Court's order granting such extension.

Appendix E

Annexed to this motion are supporting affidavits of Thomas H. Kean, William K. Dickey, Alfred N. Beadleston and Lewis B. Thurston, III, and a copy of a formal statement by Governor William T. Cahill.

A brief in support of the relief sought is filed herewith.

McCarter & English
Attorneys for Defendants-Appellants Dickey, as named party (and Beadleston and Kean as successors in office to the named parties Bateman and Dickey)
By Julius B. Poppinga
A Member of the Firm

Dated: July 20, 1973

Appendix E

Exhibit A, Affidavit of Hon. Thomas H. Kean

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } ss.:

THOMAS H. KEAN being duly sworn, upon his oath deposes and says:

1. I am the Speaker of the New Jersey General Assembly, having succeeded Assemblyman Barry T. Parker in that office as of January 11, 1972. Assemblyman Parker succeeded Assemblyman William K. Dickey in that office as of January 12, 1971.

2. I am making this affidavit in support of an application to the Supreme Court of the State of New Jersey for an enlargement of time within which to petition the Court for reargument in the case of *Robinson* v. *Cahill*, 62 N. J. 473 (Sup. Ct. 1973).

3. Assemblyman William K. Dickey, was named as a defendant party in *Robinson* v. *Cahill* in his official capacity as Speaker of the General Assembly. I am joining in the within application in my official capacity as Speaker of the General Assembly and as successor to Assemblyman Parker and Assemblyman Dickey in said office.

4. On April 3, 1973, the Supreme Court of New Jersey rendered an opinion in *Robinson* v. *Cahill*. In that opinion, written by Chief Justice Weintraub, the Court specifically stated that it desired the further views of the parties "as to the content of the judgment: and thereafter fixed a date for argument in that respect.

5. On May 7, 1973 further argument was heard by the New Jersey Supreme Court and on June 19, 1973 the Court rendered its opinion *per curiam*, which opinion was docketed on June 19, 1973.

6. I am now advised that the period within which application for reargument should have been made was 10 days from June 19, 1973, unless the time were enlarged by order of the Court. Said 10 day period expired on June 29, 1973.

7. The Office of the President of the Senate, the Office of the Speaker of the General Assembly, and the New Jersey Senate and the General Assembly as well as the Governor of the State of New Jersey and other officers of the Executive Branch, all were represented in *Robinson* v. *Cahill* by the Attorney General of the State of New Jersey.

8. It was not until I received a letter dated July 10, 1973 from the Attorney General of the State of New Jersey (a copy of which is annexed to the affidavit of Senator Beadleston herein), that I learned formally of the decision of Governor William T. Cahill to not pursue the matter further. By that time the 10 days period referred to above had expired.

9. Immediately upon receiving formal notice of the Governor's decision, in consultation with the President of the Senate, I undertook to arrange for separate legal counsel for the purpose of exhausting all possible further avenues of appeal from the final determination in *Robinson* v. *Cahill* as reflected in the Opinion of June 19, 1973. Without question, had I been advised before

Appendix E

June 29, 1973 that the Governor, and hence the Attorney General, were not going to proceed, I would have made arrangements at that time to bring on an application for reargument.

THOMAS H. KEAN
Thomas H. Kean

Sworn to July 18, 1973.

Appendix E

Exhibit B, Affidavit of Hon. William K. Dickey

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } ss.:

WILLIAM K. DICKEY being duly sworn, upon his oath deposes and says:

1. I am the Speaker *Pro Tem* of the New Jersey General Assembly, and am making this affidavit in support of an application to the Supreme Court of the State of New Jersey for an enlargement of time within which to petition the Court for reargument in the case of *Robinson* v. *Cahill,* 62 N. J. 473 (Sup. Ct. 1973). I was named as a defendant party in that case and as such am joining in this application.

2. On April 3, 1973, the Supreme Court of New Jersey rendered an opinion in *Robinson* v. *Cahill.* In that opinion, written by Chief Justice Weintraub, the Court specifically stated that it desired the further views of the parties "as to the content of the judgment" and thereafter fixed a date for argument in that respect.

3. On May 7, 1973 further argument was heard by the New Jersey Supreme Court and on June 19, 1973 the Court rendered its opinion *per curiam,* which opinion was docketed on June 19, 1973.

4. I am now advised that the period within which application for reargument should have been made was 10 days from June 19, 1973, unless the time were enlarged by order of the Court. Said 10 day period expired on June 29, 1973.

5. The Office of the President of the Senate, the Office of the Speaker of the General Assembly, and the New Jersey Senate and the General Assembly as well as the Governor of the State of New Jersey and other officers of the Executive Branch, all were represented in *Robinson* v. *Cahill* by the Attorney General of the State of New Jersey.

6. It was not until on or after July 10, 1973 that I learned that Governor William T. Cahill had formally gone on record to not pursue the matter further. By that time the 10 days period referred to above had expired.

7. Immediately upon learning of the Governor's decision, in consultation with the President of the Senate and the present Speaker of the General Assembly, I undertook to arrange for separate legal counsel for the purpose of exhausting all possible further avenues of appeal from the final determination in *Robinson* v. *Cahill* as reflected in the Opinion of June 19, 1973. Without question, had I been advised before June 29, 1973 that the Governor, and hence the Attorney General, were not going to proceed, I would have made arrangements at that time to bring on an application for reargument.

WILLIAM K. DICKEY
William K. Dickey

(Sworn to July 18, 1973)

Appendix E

Exhibit C, Affidavit of Hon. Alfred N. Beadleston

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } SS.:

ALFRED N. BEADLESTON being duly sworn, upon his oath deposes and says:

1. I am President of the New Jersey Senate, having succeeded Senator Raymond H. Bateman in that office as of January 9, 1973.

2. I am making this affidavit in support of an application to the Supreme Court of the State of New Jersey for an enlargement of the time within which to petition the Court for reargument in the case of *Robinson* v. *Cahill,* 62 N. J. 473 (Sup. Ct. 1973).

3. Senator Raymond H. Bateman was named as a defendant party in *Robinson* v. *Cahill* in his official capacity as President of the New Jersey Senate. I am joining in the within application in my official capacity as President of the New Jersey Senate as successor to Senator Raymond H. Bateman in said office.

4. On April 3, 1973, the Supreme Court of New Jersey rendered an opinion in *Robinson* v. *Cahill.* In that opinion, written by Chief Justice Weintraub, the Court specifically stated that it desired the further views of the parties "as to the content of the judgment" and thereafter fixed a date for argument in that respect.

5. On May 7, 1973 further argument was heard by the New Jersey Supreme Court and on June 19, 1973 the Court rendered its opinion *per curiam,* which opinion was docketed on June 19, 1973.

6. I am now advised that the period within which application for reargument should have been made was 10 days from June 19, 1973, unless the time were enlarged by order of the Court. Said 10 day period expired on June 29, 1973.

7. The Office of the President of the Senate, the Office of the Speaker of the General Assembly, and the New Jersey Senate and the General Assembly as well as the Governor of the State of New Jersey and other officers of the Executive Branch, all were represented in *Robinson* v. *Cahill* by the Attorney General of the State of New Jersey.

8. It was not until after I received a letter dated July 10, 1973 from the Attorney General of the State of New Jersey, a copy of which is annexed hereto, that I learned formally of the decision of Governor William T. Cahill to not pursue the matter further. Just a few days before July 10, 1973, I was advised informally of the Governor's decision through Lewis B. Thurston. Thus, by the time that I learned of the Governor's decision the 10 day period referred to above had expired.

9. Immediately upon receiving formal notice of the Governor's decision, in consultation with the Speaker of the General Assembly, I undertook to arrange for separate legal counsel for the purpose of exhausting all possible further avenues of appeal from the final determination in *Robinson* v. *Cahill* as reflected in the Opinion of June 19, 1973. Without question, had I been advised before June 29, 1973 that the Governor, and hence the Attorney General, were not going to proceed, I would have made arrangements at that time to bring an application for reargument.

ALFRED N. BEADLESTON

(Sworn to July 18, 1973)

Appendix E

Letter Annexed to Affidavit of Hon. Alfred N. Beadleston

STATE OF NEW JERSEY
GEORGE F. KUGLER, JR.
Attorney General

July 10, 1973

Honorable Alfred N. Beadleston
President of the New Jersey Senate
Honorable Thomas H. Kean
Speaker of the House

Gentlemen:

In accordance with several recent conversations that I have had with Senator Bateman and Mr. Thurston, it is my understanding that the Senate and General Assembly desire to appeal the *Robinson* v. *Cahill* decision to the U. S. Supreme Court. I recently made known to Senator Bateman and (through Mr. Thurston) Senator Beadleston the decision of Governor Cahill not to appeal the decision on behalf of the administration. Enclosed in this letter are copies of two memos from First Assistant Attorney General Stephen Skillman to me which, I believe, are self-explanatory. These memos contain the identity of the necessary parties to the appeal and the time schedule involved.

You may be assured of our complete cooperation in helping any attorney you might select to pursue your appeal to the Supreme Court. If you desire, I will execute the necessary appointment of your selected counsel as I have done on several occasions in the re-apportionment cases.

Very truly yours,

GEORGE F. KUGLER, JR.
Attorney General

GFK:bah

cc: Raymond H. Bateman, Senator
William K. Dickey, Assemblman
Lewis B. Thurston, Executive Director—Senate

Appendix E

Exhibit D, Affidavit of Lewis B. Thurston, III

STATE OF NEW JERSEY,
COUNTY OF MERCER, } ss.:

LEWIS B. THURSTON, III, being duly sworn, upon his oath deposes and says:

1. I am Executive Director, New Jersey Senate, and am the Mr. Thurston referred to in the letter of the Attorney General dated July 10, 1973, a copy of which is annexed to the affidavit herein of Senator Alfred N. Beadleston.

2. The communication with me by Attorney General George F. Kugler, Jr., referred to in said letter took place in the late afternoon of June 29, 1973. It was not until Monday, July 2, 1973, that I had opportunity to relay the information received from the Attorney General to Senator Beadleston.

LEWIS B. THURSTON, III
Lewis B. Thurston, III

Sworn to July 18, 1973.

Appendix E

Exhibit E, Formal Statement by Governor William T. Cahill

FROM THE OFFICE OF THE GOVERNOR

July 16, 1973 FOR IMMEDIATE RELEASE

Statement by Gov. William T. Cahill in response to press requests for comment on the announcement that the Legislature will appeal the Supreme Court decision in the Botter case:

After a thorough review, this Administration has decided not to join in the appeal by the State Legislature. The issue in Robinson v. Cahill involved State Constitutional questions and they have been answered by the highest court in New Jersey.

That decision was in agreement with my personal conviction that the present method of financing public education should be changed to make the system more fair and just and not place an inordinate burden on property owners. In fact, that was the basis for the recommendations of the State Tax Policy Committee and the Tax Reform Program proposed to the Legislature in early 1972.

Secondly, the planned appeal essentially involves a legislative problem—the doctrine of separation of powers between the legislative and judicial branches and whether the courts themselves can fashion a remedy for the present system of financing school aid that they have found unconstitutional.

While I am sympathetic with the effort of the Legislature to resolve that serious issue, I believe it would be inappropriate for this Administration to join in a legal action taking issue with a court decision which mandates a change in the existing system that I believe is necessary and just.

Appendix E

Brief of Defendants-Appellants William K. Dickey, et al.

SUPREME COURT OF NEW JERSEY

Docket No. 8618

KENNETH ROBINSON, an infant, by his parent and guardian, ad litem, ERNESTINE RBINSON, et al.,

Plaintiffs-Respondents

v.

WILLIAM T. CAHILL, Governor of the State of New Jersey, et al.,

Defendants-Appellants

Civil action on appeal from Judgment of the Superior Court of New Jersey, Law Division, Hudson County. Sat below: Botter, J. S. C. Direct certification granted.

BRIEF IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO PETITION FOR HEARING

McCARTER & ENGLISH, ESQS.
Attorneys for Defendants-Appellants Dickey, as Named Party (and Beadleston and Kean as successors in office to the Named Parties, Bateman and Dickey)
550 Broad Street
Newark, New Jersey 07102

Of Counsel and
On the Brief:

JULIUS B. POPPINGA

Appendix E

This is an application for enlargement of time pursuant to Rule 1:3-4(a)*, and Rule 2:9-2**. Petitioners seek an extension of time within which to apply for a rehearing in the matter of *Robinson* v. *Cahill*, 62 N. J. 473 (1973). In its main opinion of April 3, 1973, the Supreme Court specifically reserved decision as to the content of the judgment and requested further argument. Such further argument was heard on May 7, 1973, and on June 19, 1973, the Court rendered its opinion *per curiam*. That opinion was docketed on June 19, 1973. Pursuant to Rule 2:11-3(b)***, filing of the opinion constitutes entry of the judgment.

---

* Rule 1:3-4 provides:

> "(a) Enlargement by Order or Consent. Unless otherwise expressly provided by rule, a period of time thereby fixed for the doing of an act may be enlarged before or after its expiration by court order on notice. . . ."

** Rule 2:9-2 provides:

> "The time fixed by these rules for the taking of any proceeding on appeal or certification may not be extended by consent of the parties. Such extension may, however, be granted by order for good cause shown unless otherwise provided by rule . . . Adjournments, extensions and accelerations of time may be granted by the Chief Justice of the Supreme Court or the presiding judge of a part of the Appellate Division."

*** Rule 2:11-3(b) provides:

> "(b) Judgment; Order for Bail. The opinion of the appellate court shall include its judgment, and no other form of judgment shall be required . . . The date of the filing of the opinion shall be deemed to be the date of the entry of the judgment. . . ."

Appendix E

Technically, under Rule 2:11-6(a)* a petition for rehearing should be served and filed within 10 days after entry of judgment—in this case not later than June 29, 1973.

Annexed to the affidavit of the Honorable Alfred N. Beadleston, which affidavit accompanies the Notice of Motion herein, is a letter dated July 10, 1973 from Attorney General George F. Kugler, Jr., addressed to Senator Beadleston, President of the Senate, and to Assemblyman Thomas H. Kean, Speaker of the House. As appears from the affidavits filed herein of Senator Beadleston and others, that letter was the first formal notice of the decision of Governor William T. Cahill not to pursue the matter further.

As the affidavits show, the leadership of the legislature was not advised by the Attorney General of the 10-day period specified by Rule 2:11-6, nor was it advised of the Governor's decision until after that period had expired. The result is that a rigid application of the Rule would have the effect of precluding the independent exercise of judgment by the legislature with respect to a petition for rehearing.

The accompanying affidavits clearly illustrate that the leadership of the legislature would have arranged for

---

* Rule 2:11-6(a) provides in part:

> "(a) Service; Filing; Contents; Argument. Within 10 days after entry of judgment, unless such time is enlarged by court order, a party may apply for a rehearing and a recall of the judgment by serving 2 copies of a petition on counsel for each of the opposing parties and filing 9 copies thereof with the Supreme Court, or 5 copies thereof with the Appellate Division, as appropriate. . . ."

their own representation and would have undertaken to protect their right to petition for rehearing within the 10-day period had they been sooner advised of the Governor's position.

On July 16, 1973, Governor Cahill issued a formal statement in which he said that the decision of the Supreme Court in *Robinson* v. *Cahill* "was in agreement with my personal conviction" and the the issue presented by a further appeal "essentially involves a legislative problem—the doctrine of separation of powers between the legislative and judicial branches . . ." The Governor further said in his statement that he believed it "inappropriate" for his administration to join in a legal action with the legislature. (A copy of the full statement is annexed to the moving papers herein.)

The Governor's statement focuses upon the conflict of interest which is inherent in the representation of both the executive branch and the legislative branch by the Attorney General in the proceedings before Judge Botter and upon the appeal. The practical effect of that conflict of interest has now become all too apparent. It has put in jeopardy the right of the legislature to press for a further review and reconsideration of this Court's opinion.

It is apparent in retrospect that the legislature should have had independent representation throughout the proceedings in the *Robinson* case. The ramifications of the foregoing will be further developed upon the petition for rehearing but are referred to at this time simply to demonstrate that the legislature and its leadership should not be precluded from presenting their own case to this Court for rehearing.

Appendix E

That this Court has the power to grant an extension of time within which to present a petition for rehearing is made very clear by the terms of Rule 2:11-6 itself. The annexed affidavits of the President of the Senate, the Speaker of the General Assembly, and the former Speaker, establish good cause for an enlargement of time.

We turn now to the practical question of how much additional time should be granted.

Obviously, the 10-day period provided by Rule 2:11-6 does not contemplate a situation in which there is a change of counsel at this stage of a proceeding.

The leadership of the Senate and the General Assembly formally retained the services of this firm by letter of July 13, 1973, having opened conversations with members of the firm on July 10, just three days earlier. An adequate presentation of the petition for rehearing will require a careful study of the two opinions of this Court, the two opinions of Judge Botter below, and the relevant opinions in the school financing decisions of the courts of other states and, of course, the opinion of the United States Supreme Court in *San Antonio Independent School District, et al.* v. *Rodriguez, et al.*, —— U. S. ——; —— S. Ct. ——; —— L. Ed. 2d. —— (1973).

A thorough study of all the foregoing is just a first step. There must follow a study of the briefs and appendices on the subject appeal. The Appendix filed by the Defendants-Appellants runs to 480 pages and the Appendix filed by the Plaintiffs-Respondents exceeds 200 pages. In addition there is a trial record of some seven volumes which must, of course, be carefully reviewed.

Appendix E

The case presents crucial constitutional questions. The United States Supreme Court and the Supreme Court of New Jersey have determined that the disparities arising out of the financing of public education primarily by a local real property tax do not violate the Equal Protection Clause or any other provision of the Federal Constitution. Different questions are presented by the determination of the Supreme Court of this State that the so-called school clause of the New Jersey Constitution confers a justiciable right upon the citizens of this State. Those questions must be fully researched and briefed. They must be studied in the light of the Separation of Powers Provisions of the Constitution of New Jersey*, the Republican Form of Government guarantee to the States under Article IV, Section 4 of the Constitution of the United States**, and in the light of the fundamental concept of separation of powers.

---

* Article III, Section 1, provides:

"1. Branches of government.

1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

** Article IV, Section 4, provides:

"Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Appendix E

Do not the Federal Constitution and the New Jersey State Constitution assure to the citizens of a State that the integrity of its legislature and legislative process is to be guarded against undue encroachment? Even if a justiciable right were intended to be conferred by the school clause of the State Constitution, (an issue which is in serious doubt, but was totally submerged in the prior proceedings) must not that right be subordinated to the predominant interest in the preservation of separation of powers? Should the Court, even if it has the power to do so, substitute its judgment for that of the legislature, absent findings of fact that the legislature has acted wholly without regard to its constitutional mandate or arbitrarily in violation of the Federal or State guarantees of Equal Protection of the Laws and Due Process? These questions go to the heart of the matter and should be fully aired before the Court with the benefit of all the research and argument that independent counsel, acting for the legislative interest alone, can give.

It is relevant to note that no delay need result from an extension of time inasmuch as the Court will not reconvene to hear argument until after September 3. In light of the massiveness of the record and the complexity and significance of the issues to be considered, it is respectfully submitted that the time within which the petitioners may present their application for rehearing be extended for a period of 30 days from the date of the Court's order on this application for an enlargement of time.

Respectfully submitted,

McCarter & English
Attorneys for Defendants-Appellants Dickey, as Named Party (and Beadleston and Kean as successors in office to the Named Parties, Bateman and Dickey)

By: Julius B. Poppinga
A Member of the Firm.

APPENDIX F

Order of New Jersey Supreme Court, dated August 2, 1973

SUPREME COURT OF NEW JERSEY
M-471 SEPTEMBER TERM 1972

KENNETH ROBINSON, etc., *et al.*,

Plaintiffs-Respondents,

vs.

WILLIAM T. CAHILL, etc., *et al.*

Defendants-Movants.

This matter having been duly presented to the Court, it is Ordered that the motion for extension of time to file petition for rehearing is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 2nd day of August, 1973.

FLORENCE R. PESKOE
Acting Clerk

FILED

Aug. 2 1973

FLORENCE R. PESKOE
Acting Clerk

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SUPREME COURT, U. S.

FILED
SEP 7 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

DOCKET NO. 73 - 430

WILLIAM K. DICKEY, ALFRED N. BEADLESTON and THOMAS H. KEAN,

Petitioners,

vs.

KENNETH ROBINSON, an infant by his parent and Guardian ad Litem, ERNESTINE ROBINSON and ERNESTINE ROBINSON, individually; PAUL JORDAN, ARTHUR DWYER, FRANK H. BLATZ, and WILLIAM S. HART, individually and as Mayors respectively of Jersey City, Paterson, Plainfield and East Orange; THE CITIES OF JERSEY CITY, PATERSON, PLAINFIELD and EAST ORANGE; THE BOARDS OF EDUCATION OF THE SCHOOL DISTRICTS OF JERSEY CITY, PATERSON, PLAINFIELD and EAST ORANGE; THE BOARD OF SCHOOL ESTIMATE OF JERSEY CITY; and RICHARD F. McCARTHY; all individually and as representatives of a class or classes,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAROLD J. RUVOLDT, JR.,
Attorney for Respondents,

168 Ocean Avenue,
Jersey City, New Jersey 07305

N. J. Appellate Printing Co., Inc., Woodbridge, N. J. (201) 636-2030

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

DOCKET NO.

WILLIAM K. DICKEY, ALFRED N. BEADLESTON and THOMAS H. KEAN,

Petitioners,

vs.

KENNETH ROBINSON and WILLIAM T. CAHILL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

The Respondents Kenneth Robinson et al. as the plaintiffs in the cause which the Petition seeks to review, file the instant brief in opposition to the petition for a writ of certiorari to review the judgment of the New Jersey Supreme Court.

OPINIONS BELOW

The opinion of the New Jersey Superior Court is reported at 118 N.J. Super. 223, 287 A.2d 187: supplemental opinion of the New Jersey Superior Court is reported at 119 N.J. Super. 40, 289 A.2d 569; the opinion of the New Jersey Supreme Court is reported at 62 N.J. 473, 303 A.2d 273; supplemental opinion of the New Jersey Supreme Court is reported at 63 N.J. 196, 306 A.2d 65. Said opinions are appended to petitioners brief as appendices A, B, C and D, respectively.

JURISDICTION

The judgment sought to be reviewed is dated and was entered on April 3, 1973 thus the petition is untimely.

The jurisdiction of this court is invoked under 28 U.S.C.A. §1257(3) which provides for review of decisions in which state statutes are held violative of the United States Constitution but is clearly not applied herein. It should be noted the decision *sub judice* upheld the statute on every Federal ground asserted by plaintiff. The Petition purports to be by persons acting as officers of the New Jersey Legislature but the New Jersey Legislature has not authorized them to proceed. The Petitioners therefore lack standing.

The Petition on its face does not state a substantial Federal question and is a sham.

The opinion of the New Jersey Supreme Court constitutes its judgment, *N.J. Court Rules* 2:11-3(b). In its opinion filed April 3, 1973, the New Jersey Supreme Court directed further argument on remedies. The court entered its further opinion on June 19, 1973. The time within which to appeal a petition for *certiorari* runs from the date of the April 3, 1973 judgment, *Department of Banking v. Pink*, 317 U.S. 264, 268.

Petitioners applied untimely[1] by motion to the New Jersey Supreme Court for an extension of time to petition for rehearing. The New Jersey Supreme Court denied the motion by order dated August 2, 1973 (Petitioners Appendix F; p. 170a).

[1] *New Jersey Court Rules* 2:11-6(a) provide that a petition for rehearing must be made within ten days after entry of judgment.

QUESTIONS PRESENTED

1. Does this court have jurisdiction to enforce and interpret the New Jersey Constitution by reviewing decision of the New Jersey Supreme Court based solely on State grounds under the guise of the guarantee of a Republican form of government mandated by Article IV, Sec. 4 of the U.S. Constitution?

2. Does the decision of the New Jersey Supreme Court by declaring a statute unconstitutional under the State Constitution so violate the doctrine of the separation of powers as to deprive the people of New Jersey of a Republican form of government and compel Federal intervention?

3. Does the decision of the New Jersey Supreme Court violate the doctrine of the separation of powers by exercising the time honored power of judicial review?

COUNTER-STATEMENT OF CASE

On February 13, 1970 a complaint was filed in the Superior Court of New Jersey under the name *Kenneth Robinson et al. v. William T. Cahill et al.* The suit sought alternatively declaratory relief and injunctive relief presenting several complex questions which can be simplistically stated as:

Does the present system of financing and providing education violate provisions of the United States and/or the New Jersey Constitution.

That suit passed through three amended complaints as well as a pre-trial, on March 12, 1971, and was reached for trial without a jury on November 1, 1971.

To facilitate the trial both parties moved for summary judgment and agreed that all affidavits filed would be treated as evidence and defendant was deemed to have admitted all facts that their evidence did not specifically contradict, but did not admit any of the opinions set forth in the affidavits to be true, *albeit* the Court could consider and accept those opinions. The Attorney General filed no affidavits. After a trial which consumed several days, final argument in the matter was set for, and held, on December 10, 1971. Supplemental material was requested by the Court and supplied by counsel. On January 19, 1972 an opinion of the court, finding for the plaintiffs was rendered. An order for judgment was submitted to the Attorney General but objections were made and plaintiffs moved to settle the terms of the judgment, that motion was returnable on February 4, 1972. At that time, after hearing the argument of counsel, the court entered its final judgment.

The judgment included a declaratory judgment for the plaintiffs, an injunctive order effective January 1, 1973

and a directive that the Commissioner of Education file a certain plan with the Court by November 15, 1972. These later provisions were contingent upon legislative inaction in the field.

Thereafter plaintiffs moved in the Supreme Court of New Jersey for certification and to shorten the time for appeal to avoid delay of a hearing in the Appellate Division. During the pendency of that motion, the Attorney General filed his Notice of Appeal on February 25, 1972. The motion for certification was thereafter granted.

An oral application was made on February 4, 1972 by the Attorney General for an alteration in the time schedule in the judgment and for a clarification of the opinion of the trial court. That application was denied on February 4, 1972 without prejudice to the Attorney General submitting further evidence. On March 30, 1972 the trial court, after extracting the Attorney General's position, reaffirmed the denial of the application for an extension in the time schedule set forth in the main opinion and filed an opinion in connection with that denial.

On April 3, 1973 the Supreme Court of New Jersey decided the instant case of *Robinson v. Cahill,* 118 N.J. Super. 223 (Law Div. 1972); 119 N.J. Super. 40 (Law Div. 1972); *aff'd* – N.J. – (1973). In the opinion of Chief Justice Weintraub writing for the court, the court expressed the desire for further views of the parties as to: the content of the judgment including argument as to whether the judiciary may, as the trial court did with respect to the minimum aid and save harmless provisions of the so-called Bateman Act, 118 N.J. Super. at 280-281, order that monies appropriated by the Legislature to implement said act shall be distributed "upon terms other than the legislative ones." On June 19, 1973 the Court determined no further action would be taken at this time.

FEDERAL QUESTION

There is simply no Federal question involved.

The imagined federal question for which review is sought in this court involves Article IV, Sec. 4 of the U.S. Constitution. This section was not referred to in the pleadings nor was its applicability litigated in the state courts. The petitioners argue that New Jersey Supreme Court decision interfered with the prerogatives given the Legislature under Article VIII, Sec. 4, Par. 1 of the New Jersey Constitution. Such an argument is absurd. The court simply declared a statute unconstitutional as violative of the State Constitution. The petitioners argue that the decision by the New Jersey Supreme Court constitutes state action which deprives the people of New Jersey of a Republican form of government guaranteed them by the Federal Constitution. These arguments would of course apply to every declaratory judgment. Thus petitioners in essence argue that the United States Supreme Court must under the Republican form of Government clause review any state Court decision holding a State Statute unconstitutional on State grounds. Such an argument is not only absurd but would violate the fundamental relationship between the States and the Federal Government.

Under such circumstances, this court lacks jurisdiction, *Whitney v. California*, 274 U.S. 337; *Thomas v. Iowa*, 209 U.S. 258; *Cf. Adler v. Board of Education*, 342 U.S. 485, 496.

ARGUMENT

POINT I

In New Jersey the most logical point of origin to discuss any educational issue is Article VIII, Sec. IV, Par. 1 which provides in pertinent part:

> "the legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of 5 and 18 years."

This provision was first adopted in 1875 as an amendment to the 1844 Constitution. At that time New Jersey had recently enacted the Free School Law L. 1871, c. 527 and to secure the right to education in more permanent form the amendment was passed Cf. Roscoe L. West, *Elementary Education in New Jersey: A History,* D. Van Nostrand Co., Inc. (Princeton 1964) at pp. 42-45. At that time education was funded almost exclusively by a uniform tax on all real property leaving local districts to add on if required. The State Superintendent Apgar said of the concept of this system of school finance, "The principal support will come from the State, and if any sum is needed to be voted by the township, it will be small. . . ." Annual report of State Superintendent of Education 1871 at p. 12.

Thereafter the relevant history was concisely set forth by the trial court: "The 1871 School Law raised significantly the proportion of school costs borne by the State. In 1870, for example, township and district school taxes ($1.45 million) and tuition ($72,000) constituted 90% of the total statewide expenditures ($1.66 million) and the State appropriation was only $100,000. *Annual School Report, 1870,* at p. 11. Thereafter, from 1872 through 1880, State funding averaged 75% of all school costs, exclusive

of construction and repairs. Local revenues constituted 23% of current expenses and 40% of all expenditures inclusive of construction and repair of schools. In fact, during these years many townships and districts raised no school taxes at all. In 1872, for example, 188 of 230 townships and 887 of 1378 districts raised no school tax. *N.J. School Report, 1872,* at p. 8.

The State continued for many years to pay a large portion of all school costs, although in 1881 it enacted a law ordering 90% of State school taxes returned to the county of origin, leaving only 10% to be distributed by the State Board equitably. L. 1881, c. 106. However, even under the 1881 law, monies returned to the counties were apportioned to all school districts in accordance with pupil census, so that equalization was achieved at least among pupils of each county. As late as 1910, for example, the State share of current expenses was approximately 67% and was almost equal to the total cost of teachers' salaries. *N.J. School Report, 1910,* at p. xv, xvi (Da429 to Da430).

This history is of some merit in understanding the context in which the Constitution of 1884 was amended. Obviously, neither Plaintiffs nor the State Court argued that the history of the 1857 enactment is controlling, for in 1947 the clause was reenacted in the new Constitution and the intent of the new delegates may not have been that public education had to be fully funded by the State out of general revenues. A proposal to include language to clearly attain that end was not adopted, *albeit* the reasons it was not acted on or the intent of the delegates is not clear. "Recommendation of the New Jersey State Federation of Labor," V Proceedings of the Constitutional Convention of 1947, State of New Jersey, Appendix, at p. 893.

It should be obvious that the clause must have had some meaning.

Prior to the initial Amendment each municipality would determine the existence *vel non* of educational opportunities. For example, it was in September of 1682 the Assembly of West Jersey ceded an isle in the Delaware River to aid the maintenance of a public school of the town of Burlington, *Cf.* Grants and Concessions of New Jersey p. 455. Eleven years later the first tax for the support of public schools was passed within the province of East Jersey, *Cf.* Grants and Concessions of New Jersey, pp. 328, 358. Throughout these early years it was municipal government which operated the schools *Cf. Riccio v. Hoboken*, 69 N.J.L. 104, 106-107 (Sup. Ct. 1903), 69 N.J.L. 649 (Err. & App. 1903).

There can be little doubt that the constitutional amendment of 1875 was designed to have some impact. Yet our present experience indicates it did not. There is still a system of local support and maintenance of free public schools with occasional state aid. A system which has remained unchanged since public education began in this state. The Constitutionality of this means of financing of education has remained unchallenged until the instant case.

In 1894, an attack on the inequality of educational facilities in the state was launched. Justice Dixon delivered the opinion of the Supreme Court in *Landis v. School District No. 44*, 57 N.J.L. 509 (Sup. Ct. 1895). *Landis* presented on a Writ of Certiorari a tax of 1893 in School District No. 44 of Cumberland County. The moving party urged *inter alia* that the power of each school district to determine what amount beyond the state appropriation should be raised by tax resulted in unequal educational opportunities and *ergo* was unconstitutional as local or special legislation. An argument not dissimilar to that to be made in *Brown v. Board of Education*, 347 U.S. 483 (1954). *Landis*, dealt with the constitutionality

anon of taxation by school districts to give education "beyond" that provided by the State, as opposed to the failure of the State to guarantee the "right to equal educational opportunities." Nonetheless, *Landis* recognized three key legal issues which are essential to understanding the equality of educational opportunity. First—*Landis* rejected the theory that the legislature is obligated to assure the same facilities are available to every child in the State. Such an affirmative guarantee of identical *facilities* may well be an unconstitutional guarantee as we shall see later. Second—*Landis* recognized that the purpose of the constitutional amendment was "to impose on the legislature a duty of providing for a thorough and efficient system of free schools. . . ." Third—*Landis* established that the schools mandated by the constitution to be provided by the legislature had to meet a standard, to wit "affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship," at 512.

This was the clause upon which the State Court decision rests. Clearly this ground is sufficient without any reference to any Federal issue to sustain the decisions of the Supreme Court of the United States. While New Jersey's Constitution has provisions comparable to the Equal Protection Clause of the United States Constitution, the State Court declined to rely upon them.

The New Jersey Constitution, Article I, Section I provides that "all persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." As early as 1913 in *Smith v. Board of Examiners of Feeble Minded*, N.J. 35:46 (1913), Article I, Section I was recognized as a provision similar to the equal protection clause of the United States Constitution. In 1949 in

Washington National Insurance Company v. Board of Review of New Jersey Unemployment Compensation Commission, 1 N.J. 545, the initial indication of Article I, Section I, as forbidding legislation arbitrarily discriminating against some and favoring others in like circumstances was clearly set forth. There the Supreme Court recognized that there are different spheres of protection between the two provisions, but that essential to both, was the "concept of equality."

So too the New Jersey Constitution in Article I, Section V provides "no person shall be denied the enjoyment of any civil or military right or be discriminated against in the exercise of any civil or military right or be segregated in the public schools, because of religious principles, race, color or national origin." The clause of the New Jersey Constitution contains language clearly different from that of the United States Constitution, *Cf. West Morris Regional Board of Education v. Sills*, 110 N.J. Super. 234, 58 N.J. 464 (1971), but nonetheless is at least as strict as the federal constitution, *Cf. Jenkins v. Morristown*, 58 N.J. 483 and in many instances maybe stricter, *Booker v. Board of Education*, 45 N.J. 161 (1965). Specifically hereunder the plaintiffs desire to add that the equal protection clause of the New Jersey Constitution has been applied in two general categories, either dealing with rights generally under the first half of the Article, *Cf. Boulevard Apartments v. Mayor and Council of Lodi*, 110 N.J. Super. 406 (1970), *Washington National Insurance Company v. Board of Review*, 1 N.J. 545 (1949), or in specific areas such as racial discrimination in housing, *Jones v. Haridor Realty Corp.*, 37 N.J. 384 (1962); public schools, *Morean v. Board of Education of Montclair*, 42 N.J. 237 (1964); licensing, *Hart v. Teaneck*, 135 N.J.L. 174 (1947); and religion, *In Re Adoption of Seal*, 112 N.J. Super. 325 (1970).

New Jersey very recently has dealt with the question of whether or not under its constitution, as well as the federal constitution, classification of "poor people" is justifiable and constitutional. The test most concisely set forth by our courts in the case of *Puchalski v. New Jersey State Parole Board,* 104 N.J. Super. 294, *aff'd.* at 55 N.J. 113 (1969) *cert. den.* 398 U.S. 938 (1970). With respect to the poor as a classification, the question under our concept of equal protection of the law is simply whether or not the right under the constitution is of such fundamental importance that it should not be denied anyone because of lack of funds. Applied to the case at Bar the question becomes whether education is of such fundmental importance that it should not be deprived to any child because of the relative inability of his neighbors to finance his education.

Clearly the New Jersey Constitution contains adequate independent nonfederal grounds to sustain the decision herein.

Point II

The decision of the Supreme Court of New Jersey does not bridge the "doctrine" for separation of power but rather it is consistent with the traditional power of judicial review.

Attorneys General oft rely upon the "doctrine" of separation of powers to insist that an action should or may not be cognizable in a court of law. The "doctrine" has never been used to prevent a court from examining a complaint which charged another branch of government with willful discrimination against children and taxpayers, either black and/or poor who have no other remedy than to ask the court for relief.

The doctrine itself has been expressed in various ways being denominated Judicial self-restraint, 8 Rutgers L. Rev.

501; 42ABAJ, 829 or Separation of Powers 12 Rutgers L. Rev. 449, the distinction between judicial and political power has been carefully drawn.

The legitimate concern of the State Court was perhaps best expressed when a hastily and inarticulated claim of constitutionality of the public school finance system was projected with "no record" and without being "adequately briefed even by the proponents." The court said "We only suggest that the source of a solution appears to be more legislative than judicial." *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth*, 55 N.J. 501, 510 (1970). We note that the Supreme Court was speaking of the problem of declining tax base and growing demand for governmental services. We agree with the court that the issue is *more* legislative than judicial. That is not to say it is *not* judicial. In fact, the court declined to consider the constitutional question on an inadequate record and poor briefing "at this time" at 510, thereby clearly demonstrating that upon a proper record and thorough briefing it would and should consider the issue. The Court denied the plaintiffs herein the opportunity to appear as *amicus*, in that case.

It is noteworthy that the order of the court specifically provided in the *Elizabeth* case that in the event the court determines the constitutional issue to be involved in the appeal the present plaintiffs "will be permitted to come in as friends of the court." One wonders if the court foresaw the *Robinson* case as one in which the issue might be more properly presented, since the court would not consider the record before it to properly raise the issue. Similar reasoning has been used to explain the reluctance of the United States Supreme Court to act in some cases. *Cf. Gobitis, supra.*

More recently the Chief Justice, writing for a unanimous court, foresaw this problem as one arising in the

Courts when he noted, "We, of course, do not anticipate the question whether the State statutory scheme may, because of local failures, become unequal to the constitutional promise and command." *West Morris Reg. Bd. of Ed. v. Sills*, 58 N.J. 464, 477 (footnote 7) (1971).

The defendants would have this court believe that the issue is whether a court may order a legislature to deliberate, pass or repeal a statute as unconstitutional. One would expect that the existence of the power of judicial review and the concomitant duty of a court to strike down an unconstitutional legislative *fiat* was disposed of in 1803 with Chief Justice Marshall's opinion in *Marbury v. Madison, 1 Cranch*, 137 2 L.Ed 60 (1803) or in *Muakrat v. United States*, 219 U.S. 356 (1911). New Jersey recognized judicial review a year before *Marbury* in *State v. Parkhurst*, 9 N.J.L. 427 (Sup. Ct. 1802), a doctrine which this state has consistently enforced, *Wilentz v. Hendrickson*, 135 N.J. Eq. 244 (Err. & App. 1944) even to this day *Asbury Park Press v. Woolley*, 33 N.J. 1 (1966), *C. F. Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, 377 U.S. 533 (1964), *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

The most liberal jurists recognize that the injured children have no power to vote and influence the other forums of Government, and even the most conservative of jurisprudents will quickly concede that the courts have the power to hold the actions of the legislative or executive branches of government against the constitution of the Federal or State Governments. *State v. Parkhurst, supra, Wilentz v. Hendrickson, supra.* There is, of course, a presumption in favor of the constitutionality of a Legislative Act. *Cf. Trustees of Rutgers College v. Richman*, 41 N.J. Super. 259, 301 (Ch. Div. 1956). Judicial review both by Federal and State Courts is exercised with great judicial

restraint, *Cf. Ashwande v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *Massachusetts v. Mellon*, 262 U.S. 288 (1923); *Public Service Coordinated Transport v. Newark Elizabeth Independent Bus Owners Asso.*, 3 N.J. 118 (1949). Judicial restraint is not to be confused with a denial of the power of judicial review. Judicial restraint now compels the United States Supreme Court not to intervene.

Plaintiffs feel that when legislature inaction has perpetrated from 1875 to date, the time for action has come. Judicial Review is appropriate.

Realizing that the declaration of unconstitutionality could in effect end education in New Jersey and being totally unwilling to accept that alternative plaintiffs proceed one step further and say, in effect, "let the legislature perform its mandated function but supervise them to see that the scheme they develop is constitutional." This type of continuing jurisdiction is not novel, *Brown v. Board of Education*, 347 U.S. 483 (1954) did just that. In *Reynolds v. Sims*, 377 U.S. 533 (1964) the United States Supreme Court added the "threat," thinly veiled, that if the legislature refused to act, the courts would act. The threat was carried out in *Griffith v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) wherein the Supreme Court authorized the District Court to order the county to raise sufficient tax revenue to open up the schools of a county.

One U.S. Circuit Court has actually ordered equalization of facilities between predominately Negro and predominantly white schools. See *U.S. v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966) *cert. denied*, 389 U.S. 840, *rehearing denied*, 389 U.S. 965. The court in that case offered a proposed court order for the District Court as follows:

> "In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, course of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students . . . By October of each year, defendants shall report to the Clerk of the Court pupil-teacher ratios, pupil-classroom ratios and per pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools." 372 F.2d 836, 899-900.

See also *Hobson v. Hansen,* 296 F. Supp. 401 (D.D.C. 1967).

Thus the prospect of the courts, while retaining jurisdiction, ordering defendants to take certain actions, while the legislature devised a new scheme of financing education is not so alien to our system of jurisprudence. The Court below chose to rule that the law is unconstitutional without necessarily defining all of the legislature alternative measures which would meet constitutional requirements. See *William v. Rhodes,* 393 U.S. 23, 34 (1968). Thus the degree and character of the irrational irregularities in educational financing, demonstrated in the present case can result in a finding that constitutional guarantees have been breached, while still leaving the legislature free to adopt ameliorative measures such as school district apportionment, school fund supplementations, tax reformations or reallocation of resources, which would conform to the Constitutional requirements.

Even *McInnis v. Ogilvie,* 293 F. Supp. 327 (N.D. Ill. 1968) *aff'd. per curiam sub nom McInnis v. Ogilvie,* 394 U.S. 322 (1969) relied upon by petitioner, although it was different in its substance, form and theory as com-

pared with the case *Sub Judice*, decided that the "separation of powers" was no obstacle. *McInnis v. Ogilvie, supra*, and *Burrus v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), 397 U.S. 44 (1969) are unanimous in their decision that the "separation of powers" does not bar an action in the nature of that *sub judice*.

Frequently the doctrine of separation of powers is confused and/or interchanged with the doctrine of sovereign immunity by which an "unauthorized" suit against the sovereign is avoided.

A proceeding to determine the constitutional force of a statute or a suit to restrain an agent of the state from enforcing an unconstitutional statute is not barred by sovereign immunity, *Abelson's Inc. v. N.J. State Board of Optometrists*, 5 N.J. 412 (1950). This case falls precisely within the bounds of *Abelson*, it is a suit to declare a statute unconstitutional. It seeks to restrain agents from enforcing the unconstitutional statute. The docrtine of sovereign immunity simply does not apply.

To grant the Petition for Certiorari is to place in jeopardy long standing doctrines of judicial review and longstanding separation of State and Federal governments. It was these doctrines which compelled this court to uphold inequitable State financing schemes for public education in *San Antonio Independent School District v. Rodriguez*, – U.S. –, 93 S. Ct. 1278, 36 L.Ed. 16 (1973).

CONCLUSION

For all the reasons urged, and because the instant case was based upon adequate independent State grounds it is respectfully submitted that the petition should be denied.

Respectfully submitted,

/s/ Harold J. Ruvoldt, Jr.
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Supreme Court of the United States

OCTOBER TERM, 1973

Docket No. 73-430

WILLIAM K. DICKEY, ALFRED N. BEADLESTON and THOMAS H. KEAN,

Petitioners,

vs.

KENNETH ROBINSON and WILLIAM T. CAHILL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the New Jersey Supreme Court

BRIEF ON BEHALF OF *AMICI CURIAE* IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Docket No. 73-430

WILLIAM K. DICKEY, ALFRED N. BEADLESTON and THOMAS H. KEAN,

Petitioners,

vs.

KENNETH ROBINSON and WILLIAM T. CAHILL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the New Jersey Supreme Court

BRIEF ON BEHALF OF *AMICI CURIAE* IN OPPOSITION

Interest of *Amici Curiae*

Amici Curiae, Education Committee of the Newark Chapter, National Association for the Advancement of

Colored People and the American Civil Liberties Union of New Jersey, have fully participated in this proceeding. *Amici* filed briefs and argued legal points at the trial level. They also filed briefs and argued orally before the New Jersey Supreme Court both in the original appeal and the supplemental hearing on remedy. They have been intimately involved in every aspect, at every level of the instant case.

The Education Committee of the Newark Chapter of the N.A.A.C.P. is a body dedicated to obtaining equal opportunities for black children in the public school system. The Committee has consistently worked toward achieving an education system in this State which will adequately prepare every child to function effectively as a citizen with a full stake in our social, economic and political system. The Committee has been particularly concerned with the grave disparities that exist in the ability of New Jersey's inner cities, including Newark, as compared with wealthy suburbs, to raise sufficient funds for financing a "thorough and efficient" education for all public school children. The Committee is directly and immediately concerned with the resolution of the legal issues raised by the present financing system.

The American Civil Liberties Union of New Jersey is an organization dedicated to the realization and preservation of the Constitutional rights of all people of the State of New Jersey *and* with the education of the children of this State so that they may intelligently and effectively assume the roles of citizens with a full stake in our society.

Opinions Below

The opinion of the New Jersey Superior Court is reported at 118 N. J. Super. 223, 287 A. 2d 187; its supplemental opinion is reported at 119 N. J. Super. 40, 289 A. 2d 569. The opinion of the New Jersey Supreme Court is reported at 62 N. J. 473, 303 A. 2d 273; its supplemental opinion is reported at 63 N. J. 196, 306 A. 2d 65.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3), stating that "This Court has granted certiorari under this statute to review the validity under the federal constitution of provisions in a state constitution." (PW 2).* However, that jurisdictional basis is inapplicable here, where there is no question of the validity of the New Jersey Constitution's provision on education.** Thus, petitioners at the outset have improperly invoked the jurisdiction of this Court.

Petitioners also claim under their jurisdictional statement that the judgment sought to be reviewed was entered on June 19, 1973 and that a subsequent motion was made to extend the time to petition for rehearing which the N. J. Supreme Court denied on August 2, 1973. The relevance of these contentions is dealt with in the body of this brief.

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* References designated "PW" and followed by numerals refer to pages of the Petition for Writ of Certiorari.

** See PW App. C 122a-146a where Chief Justice Weintraub, for the New Jersey Supreme Court, discusses the state constitutional provision regarding education.

Questions Presented

1. Should this Court take jurisdiction over a question which was never raised below?
2. Should this Court take jurisdiction of a petition filed out of time?
3. Should this Court take jurisdiction in this case in view of its well-settled policy to deny review of decisions by a state court resting on independent and wholly adequate state grounds?
4. Should this Court take jurisdiction of petitioners' questions arising under the guarantee of a republican form of government mandated by Article IV, Sec. 4 of the United States Constitution, which questions are political and not judicial in character?
5. Should this Court, under the guise of enforcing the state doctrine of separation of powers, substitute its judgment for that of the highest court of New Jersey in construing the State Constitution?

Constitutional Provisions

U. S. Constitution, Article IV, Sec. 4:

> "Sec. 4. The United States shall guarantee to every state in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

New Jersey Constitution:

"ARTICLE III

DISTRIBUTION OF THE POWERS OF GOVERNMENT

1. Branches of Government

1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No one person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

New Jersey Constitution:

"ARTICLE VIII

TAXATION AND FINANCE

Section IV

1. Maintenance and support of schools

1. The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years."

Statement of the Case

This action was brought by students, parents, residents, taxpayers, and municipal officers of New Jersey challenging the constitutionality of the state's system of financing its public schools under Article VIII, Sec. 4, Para. 1 of the New Jersey Constitution, and under the equal protection clauses of the New Jersey Constitution and of the Fourteenth Amendment to the United States Constitution.

The trial court held that the statutory scheme violated both the education clause of the New Jersey Constitution, and the equal protection clauses of the New Jersey Constitution and of the Fourteenth Amendment to the United States Constitution (PW App. A 72a-73a). On appeal, the New Jersey Supreme Court held on April 3, 1973 that the state's method of financing education was violative of the state constitutional education provision, Article VIII, Sec. 4, Para. 1 (PW App. C 139a-146a), but expressly declined to find a violation of the equal protection clauses of the New Jersey or United States Constitutions (PW App. C 98a-122a). Further argument was held regarding remedies and a brief supplemental opinion was filed on June 19, 1973 (PW App. D).

Petitioners thereafter moved for an extension of time to petition for rehearing to the New Jersey Supreme Court. Their petition was denied on August 2, 1973.

Amici contend that the petition for certiorari also should be denied since it is insufficient, inadequate, and jurisdictionally defective in that:

1. The issue on which petitioners seek review was never raised below and, therefore, according to well-established rules of this Court, it is not subject to review.

2. The petition is untimely since it seeks review of the opinion and judgment of the New Jersey Supreme Court dated April 3, 1973.

3. No federal question is presented since the state court decision rests solely on independent and adequate state grounds.

4. Petitioners' argument that the decision of the New Jersey Supreme Court denied the State a republican form of government is jurisdictionally inadequate.

Questions arising under the federal guarantee of a republican form of government have long been considered political and not judicial in character and thus for the consideration of Congress or a legislature and not the courts.

5. The power of the state judiciary to rule a state statute relating to education unconstitutional under the State Constitution raises no federal issue under the state separation of powers doctrine.

ARGUMENT

I. The question sought to be reviewed was never raised below and, therefore, is foreclosed from review by this Court.

Petitioners concede that the issue on which they seek review by this Court was never raised prior to the New Jersey Supreme Court's April 3, 1973 opinion or its June 19, 1973 supplemental order (PW 6). However, they attempt to cure this fatal defect by now contending that the brief in their subsequent motion for extension of time to petition for rehearing properly places the issue before this Court (PW 7).

The precise question raised by petitioners' attempt has been before this Court a number of times. In all cases the result has been denial of the petition for writ of certiorari. The state of the law is succinctly summarized by STERN & GRESSMAN, SUPREME COURT PRACTICE, § 3.27, pp. 124-125 (1969):

> Raising the federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court

> actually entertains the petition and expressly decides the question. *Radio Station WOW* v. *Johnson,* 326 U.S. 120, at 128 (1945); *Hanson* v. *Denckla,* 357 U.S. 235, at 243-4 (1958); *Herndon* v. *Georgia,* 295 U.S. 441, at 443 (1935); *American Surety Company* v. *Baldwin,* 287 U. S. 156 (1932); *Forbes* v. *State Council,* 216 U.S. 396 (1910); *Simmerman* v. *Nebraska,* 116 U.S. 54 (1885) . . . There must be language indicating that the federal question was considered and disposed of. In other words, the court must exert its jurisdiction "in such a way that the case could have been brought here had the questions been raised prior to the original disposition." *Radio Station WOW* v. *Johnson, supra,* 128.

In the instant case, petitioners failed to get a petition for rehearing before the New Jersey Supreme Court since their motion for extension of time was denied (PW App. F 170a). Nor can petitioners' claim that the decision of the New Jersey Supreme Court was unexpected. Clearly they could not do so in view of the decision of the lower court (PW App. A 55a-61a) and prior decisions of the New Jersey courts in the field of education. *Jenkins* v. *Township of Morris School Dist.,* 58 N.J. 483, 279 A. 2d 619 (1971); *Riccio* v. *Hoboken,* 69 N.J.L. 649 (E. & A. 1903); *Landis* v. *School District No. 44,* 57 N.J.L. 509 (Sup. Ct. 1895).*

In addition, the petition concedes that this issue sought to be reviewed is raised only in the brief supporting petitioners' motion for an extension of time to apply for

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* The cases cited by petitioners (PW7) either arose by writ of error or concerned unique situations where the decision of the higher state court was truly a surprise and could not have been reasonably anticipated from prior decisions. (See *Herndon* v. *Georgia,* 295 U.S. 441 (1935)).

rehearing (PW 7). Here again the rule is well-settled that briefs before a state court are not part of the record filed with the Supreme Court and are not available to establish that a federal question, otherwise absent, was raised in the state court. *Lynch* v. *New York ex rel Pierson,* 293 U.S. 52 (1934); *Live Oak Water Users' Ass'n* v. *Railroad Commission of Cal.,* 269 U.S. 354 (1926); *Zadig* v. *Baldwin,* 166 U.S. 485 (1897).

Clearly, the petition should be denied since it seeks review of an issue never raised in the state court.

II. The petition is jurisdictionally defective in that it was not filed within the time period required under federal statute.

28 U.S.C. §2101(c) states:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit, or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days.

The decision and judgment of the New Jersey Supreme Court was entered on April 3, 1973.* Petitioners filed

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* The opinion of the New Jersey Supreme Court constitutes its judgment. New Jersey Court Rules 2:11-3(b). The April 3, 1973 decision of that court was clearly its opinion on the merits of the instant case. At the end of that opinion, Chief Justice Weintraub, speaking for a unanimous court, said, "Subject to the modifications expressed in this opinion and the matters reserved in the preceding paragraph, the judgment of the trial court is affirmed." (PW App. C 146a). Moreover, the June 19 supplemental opinion itself begins with the words, "In the opinion filed in this matter, 62 N. J. 473 . . .," referring to the April 3, 1973 opinion. (PW App. D 149a).

their Petition for Writ of Certiorari with this Court on September 6, 1973, 156 days after the entry of such judgment. Even had petitioners sought and obtained an extension of time from a Justice of this Court pursuant to 28 U.S.C. §2101(c), which they did not, the time for filing their petition could not have exceeded a maximum of 150 days.

Petitioners attempt, however, to evade the statutory jurisdictional disability by claiming that their time to petition this Court should run from June 19, 1973, the date the New Jersey Supreme Court filed a one-page *per curiam* supplemental opinion. Petitioners' attempt must fail. The June 19 supplemental opinion did not alter the substance of the April 3 opinion: no new substantive issues were raised, and the legal rights and duties of the parties were unaffected. Under those circumstances, the supplemental opinion does not extend the time for the filing of a petition for writ of certiorari. *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206 (1952).

III. No federal question is presented to this Court since the New Jersey Supreme Court decision rests solely on independent and adequate state grounds.

This case presents in the clearest possible way the question of whether or not the United States Supreme Court will substitute its view for that of the highest state court as to the manner in which a state constitution should be construed.

The decision of the New Jersey Supreme Court in this case was based solely on state grounds. Cognizant of this Court's opinion in *San Antonio Independent School Dist.* v. *Rodriguez*, —— U.S. ——, 93 S. Ct. 1278 (1973), the

New Jersey Supreme Court explicitly declined to rest its decision even partially on federal grounds, stating:

> There emerges from the majority opinion [in *Rodriguez*] an evident reluctance to say the federal Constitution supplies single solutions by which all states are bound. Although obviously not applauding the existing scheme, the majority would leave the problem to the processes of the several States. (PW App. C 108a)

The ground for decision in the New Jersey Supreme Court was solely that New Jersey's existing statutory system of school finance violated the express New Jersey constitutional mandate that "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools. . . ."

The adequacy of the state grounds cannot here be challenged, and it is well-settled principle that this Court will not review a state court judgment based on independent and adequate state grounds. *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1961); *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935); *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.*, 243 U.S. 157 (1917); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

IV. No justiciable question is presented to this Court under Article IV, Sec. 4 of the United States Constitution by this case.

There is no basis for petitioners' assertion that a state constitutional determination becomes a federal question through the application of Article IV, Sec. 4 of the United States Constitution.

The purpose of the guarantee of a republican form of government was to prevent a monarchy or an aristocracy from arising in any state, not to prevent the state from substituting one republican form of government for another. In the words of James Madison, it was designed to ensure "that they shall not exchange republican for anti-republican Constitutions." (THE FEDERALIST No. 43 at 292 (J. E. Cooke ed. 1961) (J. Madison)).

Alexander Hamilton stressed that, "The guarantee could only operate against changes to be effected by violence" (THE FEDERALIST No. 21 at 131 (J. E. Cooke ed. 1961) (A. Hamilton)). This view is supported by the language of Article IV, Sec. 4 which refers to protection "against Invasion" and "against domestic Violence."*

Even if the federal government might be required to act under Article IV, Sec. 4 in connection with the peaceable establishment of a non-republican form of government, for 125 years, this Court has consistently held that such action must be taken by Congress, not by the courts. It has, therefore, ruled controversies arising under the Guaranty Clause nonjusticiable.

Beginning with *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849), this Court has held such questions political and hence beyond the power of the courts to determine. In a

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* This view of Article IV, Sec. 4 is also supported by the decision in *Hoxie School Dist. No. 46* v. *Brewer*, 137 F. Supp. 364 (E. D. Ark. 1956), *aff'd*, 238 F. 2d 91 (8th Cir. 1956), where a federal court took jurisdiction under Article IV, Sec. 4 (as well as on other federal grounds), after school officials had been threatened with violence if they did not rescind a desegregation order. The court said that the officials were entitled to invoke the guaranty clause:

> It was their sacred right to function in their offices . . ., and they logically appealed to the national courts for protection under the federal law. (137 F. Supp. at 367).

long line of cases, this Court has chosen not to limit the holding in *Luther* to the facts of that case. In *Texas* v. *White,* 74 U.S. (7 Wall.) 700 (1869), for example, the Court explained its refusal to take cases arising under the Guaranty Clause. There it upheld the power of Congress to reestablish the rights of the Confederate states in the Union; this power, it said, stemmed from the Constitutional guarantee of a republican form of government. Further,

> . . . [T]he power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress . . . . (74 U.S. at 730).

In *Pacific States Telephone & Telegraph Co.* v. *Oregon,* 223 U.S. 118 (1912), this Court reaffirmed *Luther.* There an amendment to the state constitution providing for an initiative and referendum was called into question under the republican form of government clause. This Court concluded that the issues in the case were nonjusticiable citing *Luther* as controlling.

In recent years, although repeatedly asked to take jurisdiction of questions arising under the Guaranty Clause, this Court has steadfastly refused to do so. In *Baker* v. *Carr,* 369 U.S. 186, 218 (1962), the Court said, "Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable." See also *Reynolds* v. *Sims,* 377 U.S. 533, 582 (1964).

Although it is not wholly inconceivable that a proper case may arise for review of this Court's longstanding policy toward questions arising under Article IV, Sec. 4, this is clearly not the proper case. For the questions posed by the petition here would require this Court to

determine whether or not separation of powers (particularly as it applies to the demarcation of the legislative and judicial branches) is an attribute of a republican form of government incumbent upon the states, and, if so, precisely what it means in a case where the highest court of a state has done no more than exercise its traditional power to determine the validity of a state statute under the state constitution.

The framers of the Constitution provided no explanation of the role of separation of powers in a republican form of government. More than anything else, "republican" form meant to them a government that derived its powers from the consent of the governed. Specifically, it was envisaged as representative government. But the framers did not go beyond this general stipulation in defining republican form. (See T. Cooley, General Principles of Constitutional Law Ch. 11 (1891).)

It has been said that the division of state governments into three separate departments is assumed in so many places in the Constitution that their continued existence is a requirement under the Guaranty Clause. (2 G. Curtis, History, Origin and Adoption of the Constitution 470 (1858)). But the cases utilizing a Guaranty Clause theory and touching on separation of powers have been held nonjusticiable. *O'Neill* v. *Leamer*, 239 U. S. 244 (1915), for example, involved alleged delegation of authority by the state legislature to the judiciary. This Court found the matter to be a "state question." Continuing, it stated, "The attempt to invoke §4 of Art. IV of the Federal Constitution is obviously futile." (239 U. S. at 248).

Ohio ex rel. Bryant v. *Akron Metropolitan Park Dist.*, 281 U. S. 74 (1930), called into question judicial action by the state's highest court. Petitioners attacked the

method mandated in the state constitution by which state statutes were found unconstitutional. This Court said, "Assuming that the Federal question is thus brought here [under Article IV, Sec. 4], we find it to be without merit." (281 U. S. at 79). Thus, there is no body of precedent providing "judicially manageable" standards by which to evaluate the question of whether separation of powers in a state government is "upset" (PW 6) by the holding of a state supreme court that a state statute is unconstitutional under a state constitutional provision. The question raised by petitioners is clearly a political one and hence nonjusticiable.

V. No federal question is raised as to separation of powers where the highest court of the state invalidates a state statute under the state constitution.

In any case, the Supreme Court of New Jersey has merely followed here the traditional practice of a highest state court in declaring a state law unconstitutional under a state constitutional provision. As that court itself noted, separation of powers is not, and cannot be, a rigid inflexible dogma:

> . . . a strict interpretation of the principle rigidly classifying all governmental action as legislative, executive, or judicial, was never intended by Montesquieu (who is generally acknowledged to have first articulated the principle as a political theory), by the founding fathers of our federal system, or by the drafters of our State Constitutions. (*David* v. *Vesta Co.*, 45 N. J. 301, 323-24, 212 A. 2d 345 (1965)) [footnotes omitted].

And similarly:

> The doctrine of separation of powers is not peculiar to New Jersey; it exists in one form or another in almost every American constitution; and it has nowhere been construed as creating watertight compartments. To do so would render government unworkable and the slave of a doctrine that has for its beneficial purpose the prevention of despotism . . . . (*Massett Building Co.* v. *Bennett,* 4 N. J. 53, 57, 71 A. 2d 327, 329 (1950)).

The right of the New Jersey Supreme Court to review the constitutionality of a State statute is not open to question. As that court has said, that right is "historically embedded in our jurisprudence." *Wilentz* v. *Hendrickson,* 135 N. J. Eq. 244, 251, 38 A. 2d 199, 204 (E. & A. 1944). Moreover, this case does not involve a question of discretion as petitioners contend, for the court is obligated to act if a statute is challenged on constitutional grounds. "[T]he judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, . . . [it is] not at liberty to surrender, or to ignore, or to waive it." *Asbury Park Press, Inc.* v. *Woolley,* 33 N. J. 1, 12, 161 A. 2d 705, 710 (1960).

Nor is this a situation where the legislature has chosen to exercise a discretionary power less than to its fully permissible extent, as petitioners also contend. Article VIII, Sec. 4, Para. 1 of the New Jersey Constitution mandates the legislature to act in the field of education. It states: "The legislature *shall* provide for the maintenance and support of a thorough and efficient system of free public schools . . . ." (Emphasis added.)

Asbury Park Press, Inc. v. *Woolley, supra,* is a strong precedent for state court judicial review when the legislature does not fulfill an affirmative constitutional duty. There, taxpayers sought a declaratory judgment that the apportionment of the New Jersey Legislature under an act passed in 1941 was unconstitutional in light of the 1950 census. As in this case, there was a statute which covered the situation, but it failed to meet the standard demanded by the New Jersey Constitution. The court stated:

> If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him. (33 N. J. at 14, 191 A. 2d at 711).

Since in this case, the legislature failed to meet its constitutionally imposed duty, as in *Woolley,* the state courts were obligated to open their doors to those citizens whose rights had been denied.

Moreover, the state court has shown considerable restraint in the instant case, limiting itself to the judgment that the method of state school financing is unconstitutional. The court has not mandated any solution thus far, and has acted well within its powers. Its decision does not represent a departure from tradition in New Jersey or elsewhere.

Several other state courts have also recently held methods of school financing unconstitutional under their state constitutions and challenges involving state constitutional provisions are pending in almost 30 other states. *Milliken* v. *Green,* 389 Mich. 1, 203 N.W. 2d 457 (1972);

Hollins v. *Shofstall,* No. C-253652 (Super. Ct. Ariz. June 1, 1972); *Caldwell* v. *Kansas,* No. 50616 (Dist. Ct. Kan. Aug. 30, 1972). The relief ordered by those courts is comparable to the relief ordered by the New Jersey Supreme Court in this case.

Petitioners cite in support of their contention that definition of educational standards is solely within the power of the legislature the case of *Ehret* v. *School District of Kulpmont,* 333 Pa. 518, 5 A. 2d 188 (1939). But in *Ehret,* the Pennsylvania Supreme Court noted:

> The Constitution has placed the educational system in the hands of the legislature, free from any interference from the judiciary *save as required by constitutional limitations.* (333 Pa. at 522, 5 A. 2d at 190) [Emphasis added.]*

It was the New Jersey Supreme Court's view that the "thorough and efficient" clause of the New Jersey constitution constituted a limitation on the manner in which the legislature finances education.

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* *See also Keitt* v. *Ross,* No. 2849 (C.P. 1st Dist. Pa., Feb. 16, 1973), a case arising under the Pennsylvania Constitution's "thorough and efficient" education clause, where the court said:

> Defendants urge that the heart of the matter, to wit, the raising of funds for the educational system, is a problem solely and exclusively in the discretion of the Executive and Legislative branches of Government. As a general principle, this is undoubtedly correct. The Judicial branch, in our tripartite form of government, has no right to arrogate unto itself an unlimited power of review of the exercise of legislative or executive discretions. *There is, however, an obligation to intervene where there has been a violation of a mandatory duty by the elected or administrative officials charged with carrying it out.* (Emphasis added.)

Petitioners' argument that the "thorough and efficient" mandate is not precise, and therefore not open to judicial scrutiny (PW 17), is untenable. For, "the judicial power involves the application of the law to concrete facts, and, therefore, the investigation and establishment of the facts." *Bendler* v. *Bendler,* 3 N.J. 161, 172 (1960) (quoting *Wigmore on Evidence* §7). The Superior Court, Law Division, made an exhaustive study to ascertain the facts of the instant case (PW App. A 1a-74a), which the Supreme Court carefully reviewed (PW App. C 88a-146a). Merely because the legislature has delegated "responsibility for maintaining the constitutional standards to the State Board of Education and to the Commissioner of Education," (PW 17) does not mean that the judiciary should abdicate its role as a fact-finder, especially when constitutional standards are in question.

In no way has the Supreme Court of New Jersey usurped the power of the legislature. It has left to the legislature the role of defining what a thorough and efficient system requires (PW App. D 147a); it has given the legislature more than one year to meet its constitutional obligations; and it has refrained from ordering distribution of appropriated funds should the legislature not comply with its decision *Robinson* v. *Cahill* (PW App. C 145a-146a).

That the state statute in question covered fiscal matters surely does not render it beyond the scope of state judicial power as petitioners assert (PW 17-18). The New Jersey Supreme Court has in the past required the legislature to act where appropriation of funds was at issue. In *Willis* v. *Dept. of Conservation & Economic Development,* 55 N.J. 534, 264 A. 2d 34 (1970), the court held that the state was liable in tort in a certain class of cases. They allowed the legislature eight months to set up a

statutory mechanism to make funds available to meet these tort claims. The court has gone no farther here.

In short, the Supreme Court of New Jersey has acted with restraint and within its recognized judicial powers. While fulfilling its Constitutional duty it has adhered strictly to the concept of separation of powers. Petitioners are asking this Court to substitute its judgment on a question of state law for that of New Jersey's highest court. But for this Court to do so would open the floodgates to litigation, not only in school finance cases but also in any case where a legislature dislikes a decision of the state's highest court.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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October, 1973